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ABSTRACT

This reference work is a supplement to the "Desk Reference on Significant Supreme Court Cases Affecting Public Education." It compiles summaries of selected education law cases from August 2001 through July 2002 and is intended as an overview of cases important to practitioners of school law. The text opens with a topical table of cases grouped by court decisions. For example, rulings on employment are grouped by Supreme Court decisions, circuit court opinions, federal district court opinions, state supreme court opinions, and state lower court opinions. Following the topical overview are chapters devoted to the following areas: employment cases; discrimination cases; school property, finance, and reform cases; technology cases; students' rights, safety, and discipline cases; liability cases; disabilities and special-education cases; religion cases; athletics cases; and governance cases. Each chapter provides the names of the litigants, the court number, a URL listing where the case can be found on the Internet, a synopsis of each case's issue, the facts surrounding the case, and the court's holding. A special table of Supreme Court cases that affect public education, though they may not have directly involved schools, as well as an alphabetical table of cases, are included. (RJM)

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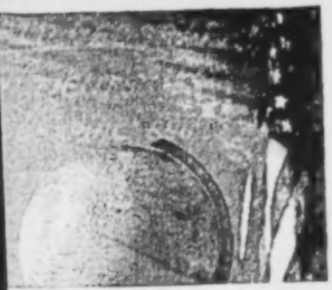

# Education Law Cases 2001 - 2002

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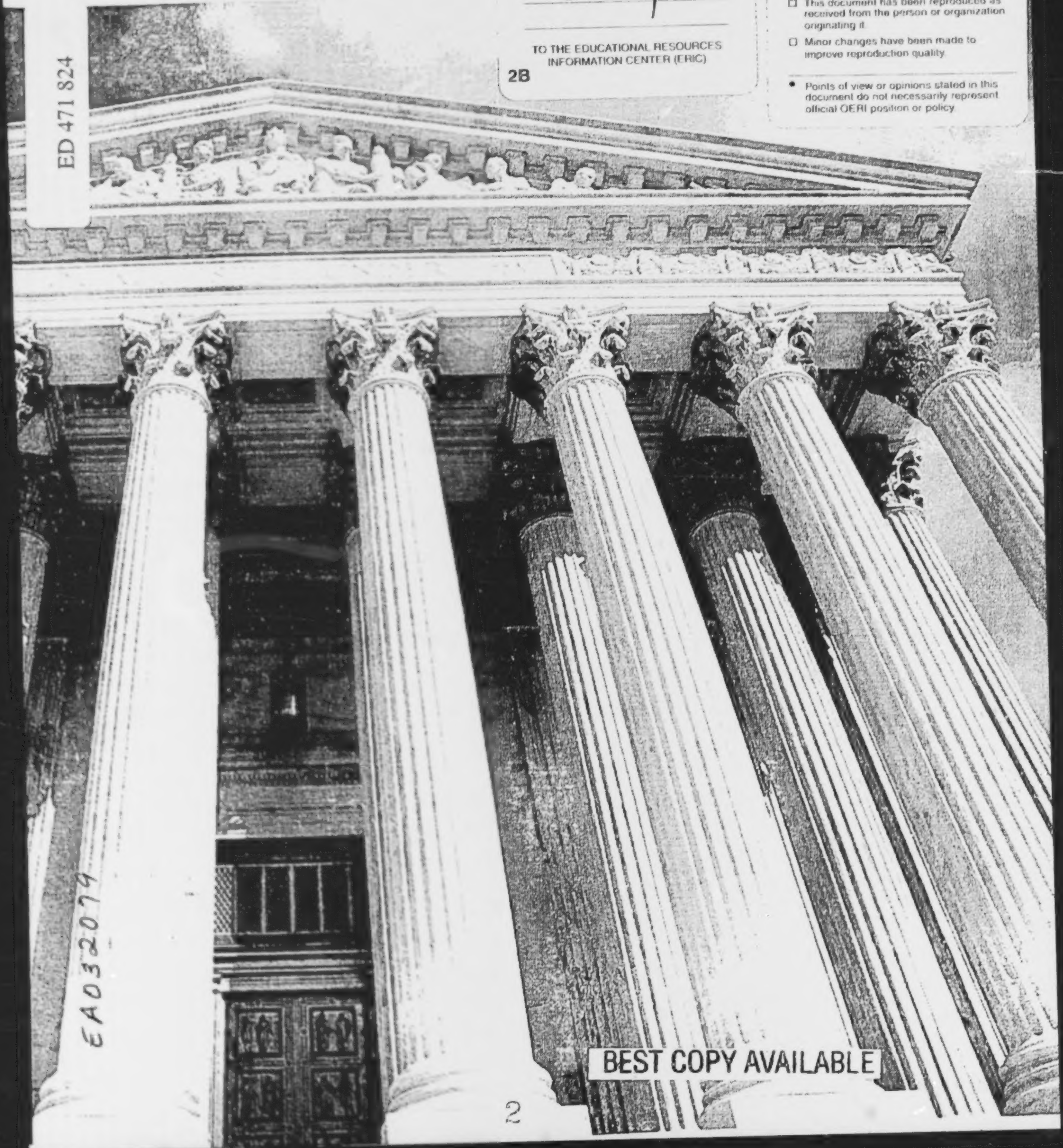

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# Education Law Cases 2001-2002

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# FOREWORD

The Council presents this reference book as a supplement to its *Desk Reference on Significant Supreme Court Cases Affecting Public Education* (2000). Written by NSBA legal staff, it compiles summaries of selected education law cases from August 2001 through July 2002. Meant as an overview, it is not a comprehensive education law reporter, but rather a review of cases selected because of their importance to practitioners of school law. The summaries focus on facts and the courts' rationale and do not offer commentary or analysis. Presented in a topical format, it includes cases from the U.S. Supreme Court, federal appellate and district courts and state supreme and appellate courts. Case summaries are grouped by court under broad topics such as employment, student rights, liability, and religion. A special section highlights U.S. Supreme Court cases that affect public education although they may not have directly involved schools. Topical and alphabetical tables of cases are provided to assist the reader in finding particular cases.

The Council extends its appreciation to the NSBA staff members who devoted their time and talents to preparing these materials for publication.

Margaret A. Chidester
Chairman, 2002-2003
Council of School Attorneys

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# EMPLOYMENT

## Supreme Court Opinions

***Chevron U.S.A. Inc. v. Echazabal***, 122 S. Ct. 2045 (2002)
http://supct.law.cornell.edu/supct/html/00-1406.ZS.html

**Issue:** Whether the Equal Employment Opportunity Commission (EEOC) regulation sanctioning an employer's refusal to employ an individual because the job would endanger the employee's health exceeds the scope of the Americans with Disabilities Act of 1990 (ADA).

**Facts:** Mr. Echazabal worked for an independent contractor at one of Chevron's oil refineries until Chevron refused to allow him to continue working because of his liver condition. Doctors had said that his illness would be aggravated by continued exposure to toxins at the refinery. The contractor subsequently laid him off in response to Chevron's request for reassignment to a job without exposure to toxins. Mr. Echazabal filed suit, alleging that Chevron's actions violated the ADA in refusing to hire him or allow him to continue working at the refinery. Chevron defended its actions, claiming that the EEOC permitted a worker to be refused employment if it would pose a direct threat to the employee's health. The district court granted Chevron summary judgment, but that ruling was later reversed by the Ninth Circuit Court of Appeals, which held that the EEOC regulation was not permissible under the ADA.

**Holding:** The Supreme Court reversed the Ninth Circuit opinion, holding that the EEOC regulation does not exceed the scope of permissible rulemaking under the ADA. The Court held that the ADA discrimination provisions are in place to prevent employers from holding back disabled persons from advancing in the workplace. Among those regulations is an affirmative defense for actions taken by employers to "protect the health and safety of other individuals in the workplace." The EEOC regulation carries this affirmative defense one step further by allowing employers to screen out potential workers whose disability on the job poses a risk to their own health and safety.

***Edelman v. Lynchburg College***, 122 S. Ct. 1145 (2002)
http://supct.law.cornell.edu/supct/html/00-1072.ZS.html

**Issue:** Whether the verification of an Equal Employment Opportunity Commission (EEOC) discrimination complaint must be filed within the same time limitation as the original charge.

**Facts:** The statutory language of Title VII of the Civil Rights Act of 1964 (Title VII) requires that a discrimination charge be filed within a given time period from the date of the alleged discrimination. After being denied academic tenure by Lynchburg College, Edelman faxed a letter to the EEOC, claiming that the college had subjected him to gender-based, national-origin, and religious discrimination. At that time he was advised to file a charge form to verify the complaint within a 300-day time limit. Edelman returned the verification form 313 days after the college denied him tenure. He subsequently sued the college in state court on various state law claims, but later included a Title VII complaint. The college had the case removed to federal court and moved to dismiss, claiming that Edelman's failure to file the verification form within the specified 300 days barred the suit. Edelman responded claiming his initial fax to the EEOC was a timely charge of discrimination and the time of verification could fall outside the 300-day limit. The district court disagreed and dismissed the Title VII claim. The Fourth Circuit affirmed, stating that since a verified charge must be made within a set time-period, both the original accusation and the verification must fall within the established time limit.

**Holding:** The Supreme Court disagreed and reversed the previous courts' decisions. The Court stated that the time limitation is in place to persuade potential parties to file initial claims before they get stale, and the verification process is there to protect employers from having to respond to unjustified claims. Therefore, the time limitation is only applicable to the initial discrimination charge.

***EEOC v. Waffle House***, 122 S. Ct. 754 (2002)
http://supct.law.cornell.edu/supct/html/99-1823.ZS.html

**Issue:** Whether an agreement between an employer and employee to arbitrate employment-related disputes precludes the Equal Employment Opportunity Commission (EEOC) from seeking victim-specific judicial remedies.

**Facts:** An agreement between Waffle House and its employees stipulated that employment disputes would be settled by binding arbitration. After suffering a seizure, a Waffle House employee, Eric Baker, was subsequently fired. In response he filed with the EEOC a discrimination charge alleging his discharge violated Title I of the Americans with Disabilities Act (ADA). The EEOC filed an enforcement suit against Waffle House, alleging that its employment practices violated the ADA and were done intentionally with malice and reckless indifference. The suit requested injunctive relief to eliminate the effects of Waffle House's employment practices and victim-specific relief, including back pay, reinstatement, compensatory damages and punitive damages, for Mr. Baker. Waffle House unsuccessfully petitioned the district court to stay the EEOC suit and compel arbitration under its employment agreement, or in the alternative to dismiss the suit. The Fourth Circuit affirmed, stating that the arbitration agreement did not foreclose action by the EEOC because the agency was not a party to the arbitration agreement. However, the court did hold that the EEOC was limited to injunctive relief and was precluded from seeking victim-specific relief because the Federal Arbitration Act favoring arbitration agreements outweighed the EEOC's right to proceed for private interests.

**Holding:** The Supreme Court reversed the Fourth Circuit, holding that an employer and employee arbitration agreement does not prevent the EEOC from seeking judicial remedies, including victim-specific relief when enforcing the ADA. The Court stated that nothing in the law suggests that the existence of an arbitration agreement between private parties changes the EEOC's function or possible remedies when regulating employment practices. The Court went on to say that the Federal Arbitration Act is in place to ensure enforceability of private agreements to arbitrate, not to place restrictions on the EEOC's right to pursue legal action.

***Ragsdale v. Wolverine World Wide***, 122 S. Ct. 1155 (2002)
http://supct.law.cornell.edu/supct/html/00-6029.ZS.html

**Issue:** Whether a Department of Labor regulation goes beyond the constraints of the Family and Medical Leave Act of 1993 (FMLA) and the authority of the Secretary of Labor.

**Facts:** FMLA requires employers to grant at least 12 weeks of unpaid leave in a 12-month period for certain medical and family needs of employees. While employed by Wolverine World Wide, Inc., Ragsdale was granted 30 weeks of medical leave under the company's leave policy. At the end of the 30 weeks, Wolverine denied Ragsdale's request for additional leave and/or permission to work part-time. It terminated her when she refused to return to work. She sued Wolverine, claiming that a Department of Labor Regulation, 29 C.F.R. Section 825.700(a), required the employer to grant her 12 additional weeks of leave because it had not informed her that her 30-week absence would count toward her FMLA entitlement. Section 825.700(a) requires an employer to give employees written notice that an absence will be considered FMLA leave within a reasonable time period after the employee informs the employer of his intention to take leave. Under the regulation, if the employer fails to notify or designate the leave as FMLA leave, any medical leave taken by the employee does not count as FMLA leave, thus entitling the employee to take an additional 12 weeks of FMLA leave. The district court granted and the Eighth Circuit affirmed Wolverine's motion for summary judgment, holding that the regulation conflicted with the FMLA statute by requiring Wolverine to grant more than the 12 weeks of FMLA required leave in one calendar year.

**Holding:** The Supreme Court affirmed the lower courts' decisions, stating that Section 825.700(a) was contrary to the Family and Medical Leave Act and exceeded the scope of the agency's authority. The Court invalidated the regulation because it was contrary to the FMLA's requirement for employers to grant a "total" of 12 weeks of leave in a 12-month period and thus gave employees more leave than they were guaranteed under the statutory mandate.

***Toyota Motor Manuf. v. Williams***, 122 S. Ct. 681 (2002)
http://supct.law.cornell.edu/supct/html/00-1089.ZS.html

**Issue:** What are the proper standards for establishing whether a person is disabled under the Americans with Disabilities Act of 1990 (ADA)?

**Facts:** An employee of Toyota Motor Manufacturing claimed to be impaired in performing certain tasks on her automobile assembly-line job. She had carpal tunnel syndrome and related impairments. She sued her employer for failing to provide her with a reasonable accommodation as required by the ADA. The district court granted Toyota summary judgment, holding that the employee's impairments did not qualify as a disability under the ADA. The court held that because her ailments did not "substantially limit" any "major life activity," she would not qualify as disabled under the ADA. The Sixth Circuit Court of Appeals reversed the decision granting the employee partial summary judgment on the issue of being disabled under the ADA. The court held that her impairments substantially limited the employee in the major life activity of performing manual tasks and that the employee's manual disability involved a "class" of activities affecting her ability to perform work. The court also held that evidence showing the employee could tend to personal hygiene and carry out household chores did not affect the determination that her impairments qualified as a disability under the ADA.

**Holding:** The Supreme Court reversed the Sixth Circuit, holding that to gain protection under the ADA an individual must show that the impairment prevents or severely restricts the person from performing tasks that are of "central importance" to most people's daily lives. The evidence must extend beyond the individual's restrictions in performing the manual tasks associated with a specific job or class of activities. The Court reasoned that the ADA definitions are intended to cover individuals with impairments regardless of whether they have any connection to a workplace whatsoever. Furthermore, the Sixth Circuit erred in excluding evidence of household chores such as bathing and brushing one's teeth because these are the manual tasks of central importance to people's daily lives and should be considered when determining a disability under the ADA.

***U.S. Airways v. Barnett***, 122 S. Ct. 1516 (2002)
http://supct.law.cornell.edu/supct/html/00-1250.ZS.html

**Issue:** Whether accommodating an employee's disability in the face of an employer's established seniority system creates "undue hardship" on the operation of its business.

**Facts:** While employed as a cargo handler for U.S. Airways, Mr. Barnett injured his back and was transferred to a less physically demanding position in the mailroom. Under the airline's seniority system, the position became subject to bidding by other employees with more seniority than Barnett. He requested that he be allowed to remain in the mailroom as an accommodation of his disability, but the airline refused. Barnett subsequently lost his job. He then filed suit under the Americans with Disabilities Act (ADA). The ADA prevents employers from discriminating against employees with disabilities who with "reasonable accommodation" can perform the job's necessary functions, unless the employer can demonstrate that the accommodation would create "undue hardship" on the operation of its business. U.S. Airways filed a motion for summary judgment arguing that altering the seniority system would result in "undue hardship" to both the airline's business practices and its nondisabled employees. The Ninth Circuit Court of Appeals reversed the district court's grant of summary judgment,stating that the seniority system was merely one piece in the analysis and that a case-by-case investigation was required when determining whether a particular accommodation would create "undue hardship."

**Holding:** The Supreme Court disagreed and vacated the Ninth Circuit decision. The Court held that under the ADA where an accommodation requested by an employee conflicts with an employer's established seniority rules, the accommodation is unreasonable as a matter of law. The Court went on to say that the analysis does not require a case-by-case analysis because the typical seniority system provides employees with job security and an expectation that advancement will be in a fair and uniform manner. However, the Court did state that an employee remains free to present evidence of special circumstances that warrant making an exception. These exceptions could include evidence that an employer frequently changed the seniority system or that the system already contained certain exceptions.

## Circuit Court Opinions

***Coggin v. Longview Independent School District*, 289 F.3d 326 (5th Cir. 2002)**

Randall Coggin was an employee of a Texas school district. On August 12, 1999, the superintendent informed him that the school board proposed to terminate his employment for cause. Under the state education code, Mr. Coggin was required to file a request for a hearing within 15 days of the notice. Coggin filed the request on August 24, 1999. However, the commissioner did not receive it until August 30, 1999. The commissioner refused to grant Mr. Coggin a hearing date under the mistaken belief that his request for a hearing was not timely. Even though the school board was aware that Mr. Coggin had filed the request for hearing within the statutory time limit, it discharged him without a hearing. Mr. Coggin filed suit under Section 1983 against the school district, alleging due process violations. The Fifth Circuit Court of Appeals ruled in favor of Coggin. The court found that even though the error was the commissioner's, the fault lay with the district. It pointed out that several valid alternatives to unilateral discharge were available, such as informing the commissioner that the request for a hearing was timely or providing Coggin with a hearing without an order from the commissioner.

***Hager v. Pike County Board of Education*, 286 F.3d 366 (6th Cir. 2002)**

Carolyn Hager was a teacher in Pike County School District (KY). She actively supported Reo Johns in his campaign against Frank Welch for school district superintendent. After Mr. Johns was elected, he appointed Ms. Hager to the position of "gifted and talented teacher/coordinator." During Mr. Johns's tenure and afterward, Ms. Hager received excellent personnel evaluations. However, after Mr. Welch was elected superintendent, he recommended, and the school board voted, to eliminate the gifted and talented teacher/coordinator position. It then established two new positions, gifted and talented coordinator and assistant coordinator. Ms. Hager applied and was rejected for both positions. She sued alleging retaliation for exercising her First Amendment rights. The Sixth Circuit Court of Appeals ruled in favor of Ms. Hager. It rejected the argument that the nature of the gifted and talented teacher/coordinator position required political loyalty to the superintendent. The court concluded that the position was solely ministerial in nature with no policymaking functions or discretionary authority delegated from the superintendent. Therefore, it decided that the board eliminated the position to penalize Ms. Hager for her loyalty to the previous superintendent.

***Sharp v. Lindsey*, 285 F.3d 479 (6th Cir. 2002)**

Gibbs High School in Knox County (TN) created a committee to consider revising its dress code. The committee submitted a revised dress code that was approved by the principal and the acting superintendent. However, when the new superintendent took office, he decided to scrap the new dress code because he believed it would not withstand a legal challenge. Approximately two weeks later, the principal sent the members of the dress code committee a letter thanking them for their service. In the letter he criticized the new superintendent's decision to scrap the code and a school board member's comments that the code was "unreasonable." The principal criticized the decision again during a meeting with his teachers. After meeting with the principal regarding the two incidents, the new superintendent reassigned him to the position of math tutor at Halls High School. Rather than reporting to his new assignment, the principal, who is a paraplegic and suffers from diabetes, took a year's medical leave of absence. He also filed suit claiming a violation of his free speech and due process rights. The district court dismissed the suit, and the Sixth Circuit Court of Appeals affirmed. Even though the court expressed doubts that the principal's criticisms of the dress code to the committee and teachers were protected First Amendment speech, for purposes of his free speech claim it assumed without deciding that the principal was speaking as a citizen on a matter of public concern. However, the court concluded that the school district's interest in providing efficient educational services to the public outweighed the principal's interest as a citizen in publicly commenting on the dress code.

***Horowitz v. Board of Education of Avoca School District No. 37***, 260 F.3d 602 (7th Cir. 2001)

Karen Horowitz was 48 years old at the time she was hired to teach fourth grade by the Avoca School District. The following year she received tenure. However, throughout her career with Avoca, Ms. Horowitz had many contentious relationships. Following a meeting with the superintendent during which Ms. Horowitz claimed the superintendent warned her not to raise an age discrimination issue, she filed a charge of age discrimination with the EEOC. The following school year Ms. Horowitz was reassigned to a fifth grade class. She then wrote an essay critical of the school district and its administrators which was posted on the Internet. When she demanded that the board investigate the issues raised in her essay, the board responded by directing her to engage in mediation with the principal and superintendent. She refused to follow the directive, and the board issued its first notice of remedial warning demanding that Ms. Horowitz engage in mediation. She complied with the mediation directive. Toward the end of the school year, she informed the principal that she would be unable to work until further notice. Approximately a month later, she returned to work. She filed a second EEOC complaint alleging retaliation. After the new school year began, the EEOC sent Ms. Horowitz notice of right to sue. She then filed suit under the ADEA, FMLA and Section 1983 against the school district. The board sent her a third notice of remedial warning based on her "unprofessional, insubordinate and unsatisfactory conduct." She again failed to report to work due to health issues and was unable to supply adequate medical certification of her condition. The superintendent recommended the board terminate her for "continuing unprofessional and insubordinate behavior." Acting on the recommendation, the board discharged Ms. Horowitz. A federal appellate court ruled that Ms. Horowitz had failed to state a valid claim under the ADEA, FMLA or Section 1983. The court concluded that the facts did not support a finding of age discrimination, especially in light of the fact that Ms. Horowitz was over 40 when hired and 50 when she received tenure. With regard to her retaliation claim, it found no causal connection between her termination and any protected activity. Turning to the Section 1983 free speech claim, the court found that the time between Ms. Horowitz posting her essay on the Internet and her termination was too remote to believe her dismissal was in response to her "speech."

***Nieves v. Board of Education of the City of Chicago***, 297 F.3d 690 (7th Cir. 2002)

Rose Nieves was a security supervisor at Schurz High School in Chicago (IL). After Principal Sharon Rae Bender informed her that her position was being eliminated due to budget constraints, Ms. Nieves filed suit against the school district in federal court. She claimed her termination was retaliation for having exercised her First Amendment free speech rights. She asserted that she was terminated after she criticized school officials at Schurz for giving Polish students preferential treatment over Hispanic students for English language tutoring. The Seventh Circuit Court of Appeals dismissed Ms. Nieves's retaliation claim because she failed to demonstrate her protected speech was a "substantial" or "motivating" factor in the decision to terminate her. The court pointed out that the only evidence presented by Ms. Nieves was her unsupported allegation that the decision to terminate her was made after she engaged in protected speech and the fact that the termination took place approximately one month after she criticized officials at Schurz. It concluded that neither piece of evidence supported finding that her termination was caused by the district's desire to retaliate against her for criticizing school officials.

***Cruzan v. Special School District No. 1***, 294 F.3d 981 (8th Cir. 2002)

When David Nielsen, a veteran teacher with the Minneapolis school system, transitioned from male to female, the school district collaborated with her to make the transition to her new gender as Debra Davis as comfortable as possible for students, parents, and co-workers. Carla Cruzan, a fellow teacher, raised a general objection to the school district's decision to allow Ms. Davis to use the women's faculty restroom. When the new school year began, Ms. Cruzan encountered Ms. Davis in the female faculty restroom. Ms. Cruzan complained to the principal in a hallway conversation but never followed up formally. Instead, she filed suit under Title VII against the school district, alleging discrimination based on religion and gender. A federal district court and the Eighth Circuit Court of Appeals both upheld the district's actions. Regarding the claim of religious discrimination, the Eighth Circuit found that although Ms. Cruzan expressed general disapproval of Ms. Davis's use of the women's restroom, Ms. Cruzan did not give the school district notice of her religious objections until after filing suit. Second, the court pointed out that the school district's decision may have inconvenienced Ms. Cruzan, but she did not suffer an adverse employment action because Ms. Davis's use of the restroom had no negative effect on Ms. Cruzan's title, salary, or benefits. Turning to the sexual harassment claim based on hostile work environment, the court found that the school district's decision to allow Ms. Davis to use the women's restroom did not create a work environment that a reasonable person would find hostile or abusive.

***Harik v. California Teachers Union,*** 298 F.3d 863 (9th Cir. 2002)

Several non-union member teachers filed suit in federal court against the superintendents of their school districts, their local unions, and the California Teachers Association over the deducting of agency fees from their salaries. The teachers alleged that the unions violated the notice requirements enunciated in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), because they did not provide non-members with audited financial statements. They also argued that the superintendents were liable for any deficiencies in the unions' *Hudson* notices because superintendents are charged with ensuring the accuracy of the *Hudson* notice before deducting agency fees from non-members' pay. The Ninth Circuit Court of Appeals ruled that the unions were not required to provide non-members with audited financial statements in order to satisfy *Hudson's* notice requirements. The court also concluded that the superintendents could not be held liable because under Ninth Circuit case law an employer is not responsible for ensuring the accuracy of the union's *Hudson* notice before deducting agency fees from non-members' pay.

***Whitney v. Board of Education of Grand County,*** 292 F.3d. 1280 (10th Cir. 2002)

Parents complained that Helen Whitney, a tenured teacher with the Grand County School District (UT), physically assaulted students, raised her voice, and cried in the classroom. After investigating Ms. Whitney's classroom behavior, the State Division of Child and Family Services (DCFS) found an allegation of physical abuse and multiple allegations of emotional abuse to be substantiated. Based on these findings, the superintendent suspended her. In response, Ms. Whitney sought protection and accommodations under the Americans with Disabilities Act (ADA) due to "mental competency." The superintendent notified her that the school district could not act on the request until she identified her disability and specified what accommodations she was requesting. At her termination hearing, her medical expert testified that she suffered from a major depressive disorder. However, the school board still voted to terminate her. Ms. Whitney sued the school board and the superintendent in federal court, alleging violation of the ADA. The Tenth Circuit Court of Appeals ruled that Ms. Whitney did not have a valid ADA claim against the superintendent, but that she could maintain her ADA claim against the board. The superintendent could not be held liable under the ADA for suspending her because at the time he acted, he did not have knowledge of her disability. But the board could be held liable under the ADA because Ms. Whitney identified her alleged disability during the termination proceedings. The appellate court sent the case back to the district court to determine at trial whether Ms. Whitney had a bona fide disability under the ADA.

***Chavis v. Clayton County School District,*** 2002 WL 1798533 (11th Cir. 2002)

William Chavis, an African-American administrator with the Clayton County School District (GA), investigated whether a white female teacher, (DW), had entered into a sex-for-grades arrangement with a 16 year-old African-American student. Mr. Chavis concluded that DW was the subject of a "witch-hunt" based on her race. Mr. Chavis claimed that after he testified at her criminal hearing, the superintendent and the director of human resources, both of whom are also African-American males, demoted him and took other adverse employment actions. Mr. Chavis sued under section 1985, a federal law prohibiting conspiracies to deny a person his right to equal protection. Mr. Chavis claimed that the two engaged in race-based retaliation because he testified for DW. The Eleventh Circuit Court of Appeals ruled that Mr. Chavis could sue under section 1985 despite the fact that he and the two other administrators are the same race. The administrators' racial animus toward DW was transferred to Mr. Chavis when he testified on her behalf.

## Federal District Court Opinions

***Downing v. West Haven Board of Education,*** 162 F. Supp.2d 19 (D. Conn. 2001)

Ella Downing, a teacher at West Haven High School (CT), wore to class a shirt inscribed with the words "JESUS 2000 – J2K". After consulting with the superintendent, Vice-Principal Martin Taylor directed Ms. Downing to either cover the shirt or go home and change into other clothes. Ms. Downing covered the shirt with a lab coat. She filed suit against the school board, claiming that her First Amendment free speech and free exercise rights had been violated. The federal district court rejected both claims. Regarding her free speech claim, the court concluded "whatever [free speech] rights were implicated by Downing, wearing her shirt must give way to the defendants' legitimate concerns about a potential Establishment Clause violation in a public school." The court found that the same reasoning applied with equal force to the free exercise claim. In addition, it found that nothing in the school's actions impeded Ms. Downing's practice of her religion.

***Smith v. School Board of Polk County***, 205 F. Supp. 2d 1308 (M.D. Fla. 2002)

Lonnie Smith served as an interim high school principal in Polk County (FL) from 1996 to 1998. During that period, he was also a member of the U.S. Air Force Reserve. At the time Mr. Smith was appointed interim principal, he was informed that to achieve permanent status he would have to complete a state mandated certification program. Carolyn Baldwin, area superintendent, put together a team of school district administrators to oversee Mr. Smith's completion of the tasks necessary to obtain certification. In March 1998, the team concluded he had not successfully completed the program. Based on the team's conclusions and Ms. Baldwin's evaluation, the superintendent recommended Mr. Smith not be certified. The state board agreed with the recommendation and denied him certification. Mr. Smith filed suit against the Polk County School District in federal district court. He claimed that the school district's refusal to recommend him for certification violated his rights under the Uniformed Services Employment and Re-Employment Rights Act (USERRA). He alleged the basis of the refusal was his membership in the military reserves. Following trial, the district court entered judgment for the school district. Although the court conceded that Mr. Smith had established a prima facie case of discrimination under the USERRA, it concluded that the school district had demonstrated that it would have declined to recommend certification even in the absence of his membership in the military reserves.

***Burke v. Chicago School Reform Board of Trustees,*** 149 F. Supp. 2d 384 (N.D. Ill. 2001)

In September 1997, Mary Burke, a teacher at Howe Elementary School (IL), became aware that several students were involved in sexual assaults and other related crimes. She reported sexual assaults on foster children to the state's Department of Children and Family Services. In June 1998, Ms. Burke was accused of insubordination, job abandonment, attendance book fraud, theft of her grade book, and fabrication of the sexual assaults. She was ordered to appear before the board's character integrity committee. She was also threatened with discipline, including termination. After Ms. Burke resigned in January 1999, the board withheld her final paycheck for four months and delayed release of her pension. In addition, Loris Brown, the principal, gave a negative reference to one of Ms. Burke's prospective employers. Ms. Burke filed suit. The court ruled that Ms. Burke had alleged facts sufficient to sustain a claim based on violation of her due process rights. Specifically, the court concluded that Ms. Burke had a constitutionally protected liberty interest in future employment opportunities that had been infringed on when her professional reputation was impugned. The accusations of fabricating sexual assault, fraud, theft, and insubordination so greatly damaged her reputation as a teacher that it made it virtually impossible for her to find future employment in the education field when the information was publicly disclosed to prospective employers.

***Hooper v. Saint Rose Parish***, 205 F. Supp. 2d 926 (N.D. Ill. 2002)

St. Rose Parish (IL) employed Roxanne Hooper as principal of its elementary school. Ms. Hooper suffers from a voice impairment that limits normal speech. When her employment contract came up for renewal, St. Rose offered her a contract containing several probationary conditions. Ms. Hooper refused to sign the contract and sued St. Rose for violating her rights under the Americans with Disabilities Act (ADA). The district court rejected her claim, concluding her voice impairment does not constitute a disability under ADA. Even assuming her impairment was a covered disability, she did not suffer any adverse employment action because the conditions contained in the new contract were already within the ambit of her job responsibilities.

***Hudson v. West Harvey/Dixmoor School District No. 147***, 168 F. Supp. 2d 851 (N.D. Ill. 2001)

Gloria Hudson, a teacher in the Chicago (IL) Public Schools (CPS) for over 25 years, filed discrimination charges with the EEOC and the comparable state agency. Ms. Hudson was eventually discharged from her employment with CPS. She was then hired by the West Harvey/Dixmoor School District as a substitute teacher. She also applied without avail for several permanent teaching positions with West Harvey. She filed suit against West Harvey, claiming that the school district's refusal to hire her was based on retaliation and age discrimination. Ms. Hudson contended that she was the victim of retaliation for having filed an EEOC complaint while teaching for CPS. A federal district court found that neither her retaliation nor age discrimination claims had merit. Regarding the retaliation claim, the court concluded that there was no causal connection between her EEOC complaint and West Harvey's failure to hire her because of the six-year lapse between the two events and the lack of evidence that West Harvey knew of the EEOC complaint. In addition, the court found that West Harvey had a legitimate nondiscriminatory reason for not hiring her, since she lacked the proper teaching credentials for the position for which she applied.

***Adams v. Calvert County Public Schools***, 201 F. Supp. 2d 516 (D. Md. 2002)

Glenwood Adams, an African-American, was employed as a custodian by Calvert County Public Schools (CCPS) in Maryland. He was promoted to head-night custodian at Windy Hill Middle School as part of a settlement of race discrimination charges he had filed against the school district. Approximately two years later, he sued CCPS after he was repeatedly denied promotion to head-day custodian. He claimed race discrimination and retaliation under Title VII and age discrimination under the Age Discrimination in Employment Act (ADEA). A federal district court dismissed the race discrimination claim because two of the three candidates chosen for the head-day custodian positions were African-American. It also rejected the retaliation claim because Mr. Adams failed to show a causal link between his filing of the earlier discrimination charges and the denial of promotion. Turning to the age discrimination claim, the court ruled that CCPS could not be sued under the ADEA because it is an arm of the state protected by the Eleventh Amendment from lawsuits in federal court (see *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000)). Maryland had not waived its Eleventh Amendment protection, and both federal and state case law establishes that "county boards of education are agencies of the state." Maryland statutory law also "clearly supports this conclusion." The court stated that even if CCPS could be sued, Mr. Adams's age discrimination claim would fail. The court pointed out that Mr. Adams had not offered any evidence to show that the school district's assertion that the other candidates were better qualified was a pretext for age discrimination.

***Erskine v. Board of Education***, 197 F. Supp. 2d 399 (D. Md. 2002)

Charles Erskine, a white middle school teacher, was accused of referring to students in his class as "niggas" and writing the word "nigger" on the blackboard of his classroom. During meetings with the principal and school district officials, he denied using the word. At the time the allegations were made, Mr. Erskine was removed from his regular classroom and assigned to work as a substitute for the remainder of the school year. When he returned in the fall, he was assigned as a permanent substitute with no change in pay. He filed suit against the school district in federal court. The district court rejected Erskine's retaliation claim because it concluded that he was speaking in his role as a teacher, not as an individual, when he used the word. Regarding the due process claim, the court found that given the extent of the deprivation suffered, he was not entitled to presentation of more specific evidence against him. Given the school district's interest in creating a positive learning environment for students, the court concluded that the notice and hearing that Mr. Erskine received satisfied due process.

***Warren v. Board of Education of the City of St. Louis,*** 200 F. Supp. 2d 1053 (E.D. Mo. 2001)

The St. Louis (MO) schools have a policy under which employees are subject to drug and alcohol testing if a supervisor has a "reasonable suspicion based on objective criteria" that an employee is under the influence of alcohol or drugs while on duty. Wilma Warren, a teacher at Ford Elementary Community Education Center, was ordered by her principal to undergo drug testing after she exhibited aggressive, erratic, and argumentative behavior. The test results were negative, and Ms. Warren returned to work with no loss of pay or benefits. She filed suit claiming her right to be free from unreasonable search and seizure had been violated. The federal district court agreed, pointing out that for a search to be reasonable, it must be based on an individualized suspicion of wrongdoing. Here the principal lacked any reasonable basis from which she could form "individualized suspicion that [Ms. Warren] was using or under the influence of drugs." As a result, the court ruled that Ms. Warren had stated a valid Fourth Amendment claim.

***Rivera v. Community School District Nine,*** 2002 WL 1461407 (S.D.N.Y. 2002)

When Anna Rivera, a New York City elementary school teacher, was implicated in a test cheating scandal, she was reassigned to a non-teaching position. After a disciplinary meeting, she received a letter of reprimand and was given an unsatisfactory performance rating for the school year. The commissioner published a supplemental report that accused Ms. Rivera of several other instances of cheating. The school district held a second disciplinary meeting after which it decided to terminate her employment. Ms. Rivera filed two separate suits in federal district court against the school district for alleged due process violations and retaliatory discharge for exercising her First Amendment free speech rights. The court dismissed the First Amendment claim because her speech did not touch on matters of public concern. The court also dismissed her due process claim because she failed to establish that she suffered a deprivation of a liberty or property interest.

## State Supreme Court Opinions

***Ex parte Board of School Commissioners of Mobile County,*** 2001 WL 1346430 (Ala. 2001)

The Board of School Commissioners of Mobile County (AL) adopted a policy that provided that "all personnel vacancies and new positions are routinely advertised." When the personnel director retired, the superintendent decided not to fill the position, and instead divided the job duties between two directors. Their positions were reclassified as executive director positions, and they received salary increases to compensate for the additional duties. At the same time, the positions of coordinator of elementary education and coordinator of secondary education were reclassified as director level positions. An employee filed suit claiming the board violated its policy to advertise all vacancies and new positions when it failed to advertise the four reclassified positions. The Alabama Supreme Court ruled that the reclassification of the positions did not constitute creation of new positions and, therefore, the board was not required to advertise those reclassified positions because it was not filling a vacancy or a new position.

***Williams v. Little Rock School District,*** 66 S.W.3d 590 (Ark. 2002)

Williams, a tenured teacher, told his principal that he quit. The principal responded that he had to submit a written resignation. However, the next day when Mr. Williams wanted to recant the resignation, the principal said his resignation had already been accepted by the administration. Approximately three weeks later, the school board met and formally accepted Mr. Williams's verbal resignation. Mr. Williams filed suit against Little Rock School District, claiming that acceptance of his oral resignation violated the Arkansas Teacher Fair Dismissal Act (TFDA). The Arkansas Supreme Court ruled that strict compliance with the procedural requirements of the TFDA was not required because it was not a "nonrenewal, termination, suspension, or other disciplinary action" triggering the due process protections of the law. The resignation was upheld.

***Kansas State Board of Education v. Marsh***, 50 P.3d 9 (Kan. 2002)

Charles Marsh, a tenured teacher at the Kansas State School for the Deaf (KSSD), organized and got approval for a field trip for some students to move railroad ties from a railroad right of way to his property. While moving the ties, one of the students was struck by a train and killed. The Kansas State Board of Education concluded that Mr. Marsh had engaged students in an inappropriate and dangerous activity and had failed to exercise professional judgment and care for their safety. A hearing committee reversed the board's decision and ordered Mr. Marsh reinstated. The Kansas Supreme Court upheld the hearing committee. In reaching its decision, the court considered whether the committee's decision was supported by substantial evidence. While noting that the board and committee could reasonably disagree about specific evidence, the court ruled the record supported the committee's finding that the board lacked good cause to terminate Mr. Marsh.

***Arriola v. Orleans Parish School Board***, 809 So.2d 932 (La. 2002)

When questioned about attendance problems, Roy Arriola, a teacher in New Orleans, admitted to cocaine use. He participated in a six-month outpatient drug rehabilitation program. He returned to teaching with probationary status during which he was subject to random drug testing as a part of the rehabilitation program. Approximately three months into his probationary period, Mr. Arriola tested positive for cocaine. The superintendent recommended to the school board that Mr. Arriola be terminated on the grounds of willful neglect of duty and immorality. During the termination hearing, employees of the company that conducted the drug testing testified. However, no one from the lab where the actual chemical analysis took place testified. The school board voted to terminate Mr. Arriola. He filed suit alleging his due process rights had been violated. He argued that he was deprived of sufficient opportunity for cross-examination regarding the test results because no one from the testing facility testified at the hearing. The state supreme court ruled that Mr. Arriola was afforded due process at his hearing, even without specific testimony from the lab.

***Hughes v. Stanley County School District***, 638 N.W.2d 50 (S.D. 2001)

Mary Hughes, an elementary school guidance counselor, was approached by M.B., a third grade student, who reported that her father had engaged her in inappropriate sexual behavior. Although Ms. Hughes believed that M.B. was fabricating or exaggerating the facts, she contacted the parents. During a meeting, the parents admitted some of the misconduct, but M.B.'s father stated that he had taken steps to remedy his behavior. Ms. Hughes continued to monitor the situation on a daily basis, but M.B. did not report any further incidents. Several months later, M.B.'s father was charged with sexually assaulting a neighbor child. During the police investigation, they interviewed Ms. Hughes regarding the allegations that M.B. had made to her. After M.B.'s father pled guilty to the sexual assault, Ms. Hughes was charged with criminal failure to report child abuse or neglect under state law. Her case ended in a mistrial, and the charges were dismissed. The superintendent of schools notified Ms. Hughes that he was recommending her termination for violating the school policy regarding reporting child abuse and prohibiting teachers from contacting the parents regarding the cause of the abuse. Following a hearing, the school board voted to terminate Ms. Hughes. The South Dakota Supreme Court overturned the board's decision because they found no evidence to support the board's conclusion that Ms. Hughes failed to report child abuse. The board lacked evidence to support its conclusion that Ms. Hughes suspected abuse and, therefore, violated school policy by not reporting it.

***Linzmeyer v. Forcey***, 646 N.W.2d. 811 (Wis. 2002)

The local police investigated Armand Linzmeyer, a teacher at Neenah High School (WI), for allegedly making inappropriate statements to and engaging in inappropriate conduct with female students. Neither the local prosecutor nor the school district took action against Mr. Linzmeyer. A local newspaper and parents of two students requested release of the police report under the state open records act. When the

Neenah City Attorney announced his intention to release the report, Mr. Linzmeyer sued to bar release of the report, claiming it would damage his reputation and invade his privacy. The Wisconsin Supreme Court ruled that the report could be released. Concluding that the open records act applies to police investigative reports, it found that the public's interest in protecting Mr. Linzmeyer's reputation and privacy was outweighed by the public's interest in the release of the information.

***State v. Polashek***, 646 N.W.2d 330 (Wis. 2002)

In accordance with Wisconsin's statute requiring schools to report suspected child abuse to their local department of human services, two Oconto Falls Area School District employees reported a suspicious mark on a student's forehead. After speaking with the student, a social worker concluded that abuse was unlikely. The student's parents, unhappy with the school's handling of the incident, met with the school district's superintendent, David Polashek. Mr. Polashek then met with the employees who made the report. Following that meeting, he sent the parents a letter disclosing the names of the employees. Copies of the letter were also sent to the employees. They filed a criminal complaint against Mr. Polashek for violating Wisconsin's child abuse reporting law by revealing the names of persons reporting suspected abuse. The Wisconsin Supreme Court upheld the criminal conviction, holding that (1) the state was not required to prove the parents lacked prior knowledge of the employees' identities; and (2) the disclosure need not be intentional since the statute requires the state to show nothing more than unauthorized disclosure of persons reporting abuse.

## State Lower Court Opinions

***Kavanaugh v. West Sonoma County Union High School District***, 111 Cal. Rptr. 2d 829 (App. 2001), *vacated pending review*, 36 P.3d 626 (Cal. 2001)

Alta Kavanaugh was hired in 1999 to teach English at Analy High School as a temporary teacher. In April 2000, the school board decided for budgetary reasons not to re-employ several temporary teachers including Ms. Kavanaugh. She filed suit seeking re-employment as a probationary teacher. Ms. Kavanaugh, relying on a section of the state's education code, argued that because the school district failed to provide her with written notice that her employment was temporary on the date she began work, she was entitled to re-employment. A state appellate court disagreed with Ms. Kavanaugh's argument. It ruled that the district's notice to her several weeks after she started working was valid because the statutory language, "at the time of initial employment," does not refer to the date an employee begins work but rather to the date her employment is approved by the school board. It reasoned that the term "employment" refers to creation of the employer-employee relationship which occurred on the date when the board approved her employment.

***Welch v. Oakland Unified School District***, 111 Cal. Rptr. 2d 374 (App. 2001)

Melanie Welch and Mark Petrofsky, participants in separate teacher internship programs, were both hired by the Oakland Unified School District (CA) to fill teaching positions. They obtained internship teaching credentials from the California Commission on Teacher Credentialing (CTC) and signed employment contracts specifying that either party could terminate the contract by giving 15 days notice. Shortly after they began teaching, both of them encountered difficulties on the job and were terminated by the school district with less than 30 days notice and without a hearing. Ms. Welch and Mr. Petrofsky filed separate suits, claiming that their rights under the education code as district interns to 30 days notice and a hearing were violated by the school district. The California Appellate Court found that the legislative history and statutory language clearly indicated the legislature's intent to treat district interns as probationary employees. As a result, the appellate court held that the employment contracts providing for termination on 15 days notice by either party was an impermissible attempt to abrogate the school district's mandatory duty under the education code to provide 30 days notice and an opportunity for a hearing before terminating a district intern.

***Illinois Education Association v. Illinois State Board of Education*,** 762 N.E.2d 1190 (Ill. App. 2002)

The Illinois Education Association (IEA), an organization representing public school teachers, filed a request pursuant to the Freedom of Information Act (FOIA) for documents that the Illinois State Board of Education submitted to the Illinois Attorney General in conjunction with several requests for legal opinions regarding teacher certification issues. The state board denied IEA's request, alleging the documents it submitted to the attorney general were exempt from FOIA because they were covered by the attorney-client privilege. A state appellate court agreed with the state board and ruled that the documents were exempt under FOIA. The court found that the attorney general is the chief legal officer of the state responsible for representing state officials, such as the state school board. As a result, it concluded that any documents provided by the board while seeking legal advice from its attorney would be protected from disclosure by the attorney-client privilege of confidentiality.

***Fort Wayne Education Association v. Fort Wayne Community Schools*,** 753 N.E.2d 672 (Ind. App. 2001)

Patrick McKinney, a substitute teacher at Kekionga Middle School (IN), was supervising basketball practice. During a break in practice, Mr. McKinney approached J.H., a female student. He placed his hands in his shorts and stated he did not like the new underwear he was wearing. Approximately 10 minutes later, he lifted up his shirt and showed J.H. his pierced nipple. The next day J.H. told her basketball coach, counselor, and principal about the incident and stated that it made her feel uncomfortable. The following day the principal held a meeting with J.H., her parents, Mr. McKinney, and the counselor. Mr. McKinney apologized to J.H., who then went with him to the gym to play basketball. About a month later, Mr. McKinney was informed by the school district that he was being terminated for "inappropriate conduct by a teacher to a student, and confirmed allegations of sexual harassment." Pursuant to the collective bargaining agreement, he waived his right to a school board hearing and requested binding arbitration. The arbitrator ruled that Mr. McKinney's actions were inappropriate, but only warranted a one-week suspension rather than termination. A state appellate court agreed with the arbitrator that Mr. McKinney's actions did not warrant termination. The court characterized the teacher's actions as an isolated incident that made J.H. uncomfortable for a few days but were not severe, persistent, or pervasive behavior constituting sexual harassment. The court also rejected the school district's contention that it had the authority to terminate Mr. McKinney based on immoral conduct. It reiterated that while adjusting his underwear and showing his pierced nipple demonstrated poor judgment, neither action constituted a crime or even a violation of school district policy.

***Schwartz v. Gary Community School Corp.*,** 762 N.E.2d 192 (Ind. App. 2002)

Joel Schwartz had been employed by the Gary Community (IN) school district for over 20 years. During the 1996-1997 school year, he took an approved one-year sabbatical from his position as acting director of the department of evaluation and research. He returned to his position for the 1998-1999 school year. In January 1999, Mr. Schwartz was informed that his contract would not be renewed for the following year. After applying without success for other positions within the school district, he informed the school district that he was resigning. When the school district failed to pay him for his accumulated unused sick leave, Mr. Schwartz filed suit. He contended that he was entitled to treble damages for the school district's failure to pay for the leave. The school district countered that he was not entitled to treble damages for the sick leave because accumulated sick leave is not considered "wages" under the state's wage payment statute. A state appellate court agreed with Mr. Schwartz that he was entitled to treble damages for his unused sick leave. The court pointed out that under the statute accrued vacation pay is considered wages. Noting that like vacation pay, sick leave is also accrued over time, the court stated that it found no reason to distinguish between vacation pay and sick leave for purposes of the wage payment statute.

***South Newton School Corp. Board of School Trustees v. South Newton Teachers Ass'n*,** 762 N.E.2d 115 (Ind. App. 2001)

During the 1998-1999 school year the South Newton (IN) school district canceled eight student instructional days due to hazardous weather. Under state law, the school district was required to provide 180 days of instruction. South Newton received a waiver for two of the days, leaving it with six make up days. The teachers' collective bargaining contract required them to work a total of 185 days. The agreement did not distinguish between instructional and non-instructional days. The school district decided that the teachers should be required to make up the two days that were waived during the summer as non-instructional professional development workdays. Although South Newton discussed the arrangement with the union, the district did not engage in bargaining with the union. The teachers' union filed suit, claiming that the school district had engaged in an unfair labor practice. A state appellate court ruled that the school district had committed an unfair labor practice by requiring the teachers to make up the two days without first submitting the issue to collective bargaining. The court interpreted the state's closing law to not require teachers to make up days that a school is closed unless the school district reschedules those as instructional days.

***Wyatt v. Avoyelles Parish School Board,*** 799 So. 2d 1197 (La. App. 2001), *cert. granted,* 811 So.2d 937 (La. 2002)

In August 1981, the Avoyelles Parish School Board (LA) amended its written leave policy to compensate non-teaching employees for any unused annual leave. During 1982, several employees were compensated for unused leave. However, the state's legislative auditor notified the board that its practice conflicted with the state constitution. In 1983, the board implemented an unwritten policy of "use or lose" in regard to annual leave. Several employees were denied compensation for unused leave when they retired. These employees filed suit for compensation for the unused leave. A state appellate court ruled that the retired employees were entitled to compensation for their unused leave because the leave was in the nature of wages or an amount then due under the terms of employment. The court rejected the board's contention that the leave was a gratuity, pointing out that neither the board's original policy nor the 1981 amendment made it clear that leave is "a mere gratuity and not an amount due."

***Leavitt v. City of Lynn,*** 769 N.E.2d 296 (Mass. App. 2002)

After Allan Leavitt, human resource manager for the City of Lynn (MA) school district, was indicted for insurance fraud, the superintendent suspended him without pay. Mr. Leavitt subsequently resigned his position when he pleaded guilty to the fraud charges. Mr. Leavitt later filed suit in state court to recover back wages for the period of time between his suspension and resignation. The school district contended that he was suspended in accordance with state law for "misconduct in such office or employment." The Massachusetts Court of Appeals ruled that Mr. Leavitt was entitled to back wages because the state law that gave the district authority to suspend employees applied to teachers but not to human resource managers. It found nothing in the record to establish Mr. Leavitt had any teaching duties. As a result, the court concluded that the position of human resource manager was not analogous to the position of teacher in terms of the law's reach.

***Sheridan v. Forest Hills Public Schools,*** 637 N.W.2d 536 (Mich. App. 2001), *appeal denied,* 626 N.W.2d 475 (Mich. 2002)

In August 1993, Vicki Sheridan, a female custodian with Forest Hills Public Schools (MI), reported that she was being sexually harassed by a male coworker, Vern Knapp. The school system launched an immediate investigation that resulted in Mr. Knapp being terminated. Shortly after reporting the incident, Ms. Sheridan took a leave of absence and then exhausted her medical leave before deciding not to return to work. In February 1996, Ms. Sheridan filed suit under Michigan's civil rights act against the school system, alleging Mr. Knapp's sexual harassment created a hostile work environment. Relying on the theory of respondeat superior, which holds employers liable for the acts of their employees, Ms. Sheridan claimed that from 1990—when Mr. Knapp raped her—until his dismissal in 1993, he continually sexually harassed her. A state appellate court ruled that Forest Hills Public Schools was not liable under the state's civil rights act for hostile work environment sexual harassment. The court stated that Forest Hills could only be held liable for Mr. Knapp's actions if it had actual or constructive notice of the alleged sexual harassment and failed to take prompt and appropriate action to eliminate the hostile work environment. It found, based on Ms. Sheridan's own admissions, that she did not report Mr. Knapp's sexual harassment until August 1993. The court concluded that Forest Hills could not be held liable from that point in time because it took prompt action to investigate Ms. Sheridan's charges and to eliminate the harassment by terminating Mr. Knapp.

***LeVake v. Independent School District No. 656***, 625 N.W.2d 502 (Minn. App. 2001), *cert. denied*, 122 S. Ct. 814 (2002)

On January 7, 2002, the U.S. Supreme Court declined to review a case in which a biology teacher was reassigned after he refused to teach the theory of evolution in his class. When Rodney LeVake was assigned by Independent School District No. 656 (MN) to teach tenth grade biology, he was aware that he would be required to teach about evolution. However, when he reached the evolution component of the curriculum, Mr. LeVake spent only one day on the subject. Principal Dave Johnson and Curriculum Director Cheryl Freund questioned his failure to spend more instructional time on the subject. Mr. LeVake responded that he could not teach about evolution because he did not consider it a viable scientific theory. As a result, Principal Johnson reassigned Mr. LeVake to teach a ninth grade natural science class for the following year. Mr. LeVake filed suit, claiming the school district violated his rights to freedom of speech, freedom of religion, and due process when it reassigned him. A state appellate court ruled that neither his free speech, freedom of religion, nor due process rights were violated by the reassignment. Regarding his freedom of religion, the court found that nothing pertaining to his reassignment infringed on his ability to practice the religion of his choice. Turning to the free speech claim, the court rejected Mr. LeVake's argument that his reassignment was to silence his criticism of evolution in violation of his freedom of speech. The court found that the school district's interest in having a prescribed curriculum taught overrode the teacher's free speech rights as a private citizen. Finally, the court found no due process violation based on lack of notice because Mr. LeVake was aware of the curriculum requirement on evolution before he began teaching the biology course.

***Thomas v. Independent School District No. 2142***, 639 N.W.2d 619 (Minn. App. 2002), *appeal denied*, 6 No.21 Minn. Lawyer 17 (2002)

In December 2000, Robert Thomas retired after 17 years of teaching. In January 2001, he was rehired to fill the vacancy created by his retirement. The superintendent notified Mr. Thomas that he was being given a "long term substitute" assignment and was being classified as a probationary teacher. In May 2001, the school board informed him that it had voted not to renew his contract. Mr. Thomas filed suit against the school district, claiming that he was entitled to continuing contract rights as a tenured teacher. The court rejected Mr. Thomas's argument that he had a continuing contract rather than a long-term substitute contract. It pointed out that the written documentation clearly indicated that he had a substitute contract with no continuing contract rights. The court concluded that while state law clearly gave retired teachers the right to continue to receive their retirement payments if they were rehired, that law said nothing about continuing contract rights under additional teaching contracts.

***Kemper County School District v. Mississippi Employment Security Commission***, 2002 WL 982633 (Miss. App. 2002)

Donald Griffin was employed by Kemper County School District (MS) as the food manager. He was terminated for failure to follow work policies and procedures and lack of accountability for property under his supervision. Mississippi Department of Education audits for two years had revealed deficiencies in inventory controls, expenditures, purchasing practices, recording keeping, and internal controls. After several administrative appeals, Mr. Griffin was granted unemployment benefits on the ground that he was discharged for lack of performance rather than misconduct. The Mississippi Court of Appeals agreed that he was entitled to unemployment benefits. The court ruled that Mr. Griffin's failure to accomplish several job-related tasks was indicative of poor work performance, not misconduct.

***Bello v. Lyndhurst Board of Education***, 781 A.2d 70 (N.J. Super. App. Div. 2001)

Donna Bello was hired by the Lyndhurst (NJ) school board as an assessment manager processor. She received a positive six-month performance evaluation from the acting superintendent. The following year, Superintendent Joseph Abate returned to work from his leave of absence. Due to low work volume, Mrs.

Bello was transferred to work as secretary in the guidance department of the high school. She later publicly supported a slate of candidates for the school board who ended up losing the election. After the election, Superintendent Abate informed Mrs. Bello that her position was being eliminated for financial reasons. When Mr. Abate reported to the board that he was eliminating the assessment manager processor position for budgetary reasons, he did not mention that Mrs. Bello was the person occupying the position. Mrs. Bello filed suit against the board, alleging that she was the victim of retaliatory discharge for her political affiliation in violation of her free speech rights. The court noted that it is unconstitutional for public employers to discharge an employee who holds a position that is neither policymaking nor advisory based on the employee's political affiliation. However, it concluded that even though Mrs. Bello was exercising her free speech rights by publicly supporting a particular slate of candidates for the board, her allegations of political retaliation were mere speculation that could not overcome the stated reason for the termination, namely financial constraints created by the board imposed budget cap.

***Arnett v. Franklin Monroe Local Board of Education***, 2002 WL 1483149 (Ohio App. 2002)

The Franklin Monroe Local Board of Education (OH) employed Keith Arnett as a bus driver. After school officials, parents, and students complained about his driving, the superintendent recommended to the board that Mr. Arnett be terminated. During an executive session, the board voted to terminate his employment based on his comments to the superintendent that he was only trying to scare a student by almost hitting him with the bus. Mr. Arnett challenged his termination, claiming that the evidence did not support his termination and that the board violated his due process rights to notice and hearing. The Ohio Court of Appeals ruled that given his right to know the grounds for his termination, the board should have informed him of the substance of the superintendent's testimony. Because the board did not provide this information to him before terminating him, Mr. Arnett has a right to a new hearing.

***Morrison v. Board of Education of Weatherford Public Schools***, 47 P.3d 888 (Okla. App. 2002)

Geoffrey Morrison was a probationary teacher in the Weatherford (OK) public school system. In addition to his teaching duties, Mr. Morrison was varsity soccer coach. After the superintendent became aware that Mr. Morrison had violated state interscholastic association rules in connection with his soccer coaching duties, he decided to recommend to the school board that Mr. Morrison's contract not be renewed. On April 10, 2000, the principal hand delivered to Mr. Morrison a letter stating that the superintendent intended to recommend that the board not renew his contract. Mr. Morrison requested and was granted a due process hearing before the board, after which the board voted not to renew his contract. He filed suit against the board in state court. He claimed that he was entitled to renewal of his contract because the board failed to follow the procedure set forth in Oklahoma's Teacher Due Process Act (TDPA). The court found that the board failed to follow the TDPA in three instances. First, the board failed to comply with the requirement that the notice come from the board; Morrison's letter was sent by the superintendent. Second, the letter was hand delivered by the principal rather than sent by registered or certified mail as required under the TDPA. Third, the letter was delivered on April 10 rather than prior to that date as mandated by the TDPA. The Oklahoma Court of Civil Appeals ruled that Mr. Morrison was entitled to reemployment as a matter of law.

***Bellefonte Area School District v. Deak***, 779 A.2d 1240 (Pa. Commw. 2001)

Tracey Deak, a special education teacher at Bellefonte Middle School (PA), requested and was granted a sabbatical. Prior to her sabbatical Ms. Deak taught in a "part-time" special education classroom consisting of sixth, seventh, and eighth graders in which the classes had no more than nine special education students at a time. During her leave, she was paid 50% of her salary and continued receiving benefits. When Ms. Deak returned from her sabbatical, she was assigned as a "resource room" special education teacher for seventh grade students with 16 to 20 students in the classroom. Ms. Deak claimed that she was unaware she was being assigned to a resource room. As a result, she was unprepared to handle the larger class size and struggled to adjust her part-time program. Ms. Deak became frustrated and resigned less than a year after returning from her sabbatical. Under state law, a teacher is liable for a pro-rata amount of the benefits received while on sabbatical, if the teacher fails to complete at least one school term after returning to her same position. Relying on that law, the school district demanded that Ms. Deak repay a share of the benefits she received while on sabbatical. She countered that she was not liable for the pro-rata share because she had not been returned to her previous position. A state appellate court ruled that the issue of whether the two positions were the same was a disputed question of fact. As a result, the court concluded that the case should be returned to the trial court to allow the teacher an opportunity to present evidence regarding how the two positions were different.

***Hawes v. Public School Employees' Retirement Board*,** 778 A.2d 1277 (Pa. Commw. 2001)

Under a contractual agreement, Educational Placement Services (EPS), a private corporation, provided Wallingford Swarthmore School District (PA) with certified substitute teachers. In 1981 Catherine Hawes was hired through EPS as a long-term substitute chemistry teacher for the 1981-1982 school year. Ms. Hawes was interviewed and recommended by school district administrators. She neither submitted an application to EPS nor interviewed with an EPS representative. EPS played no role in assigning or supervising her. Although EPS handled all her payroll matters, her salary was supplied by the school district. EPS was listed as her employer on her W-2 forms and tax return. The following year, the school district hired Ms. Hawes for a permanent teaching position. In 1998, she requested that the Public School Employees' Retirement Board credit the 1981-1982 year toward her retirement. The board refused her request on the ground that she was not a school district employee during that year because her salary was not paid by the school district. The court found that all her duties were related to the district and that she had virtually no contact with EPS. In addition, it concluded that EPS merely served as a conduit for receiving her paycheck because the district set her salary and supplied the funds to EPS. The appellate court ruled that Ms. Hawes worked for the school district rather than EPS during the 1981-1982 school year.

***United School District v. United Education Association*,** 782 A.2d 40 (Pa. Commw. 2001)

Between 1985 and 1998, United School District teachers taking early retirement received an incentive of up to $10,000. However, they did not receive a buy-out for their unused sick leave. The collective bargaining agreement (CBA) stated that a teacher taking early retirement would be paid an incentive according to the schedule in the early retirement plan, unless the amount due that teacher for unused sick leave was greater. In 1998 the teachers' union asserted that teachers taking early retirement were entitled under the CBA to both the incentive and payment for unused sick leave. After hearing evidence from both parties, including the school district's presentation of the negotiating history of the CBA and the 13 years of the custom and practice of paying either the incentive or the sick leave, but not both, an arbitrator ruled that the CBA was clear and unambiguous that teachers were entitled to both payments. The appellate court upheld the arbitrator's ruling, even though it found the arbitrator's legal reasoning flawed. The court stated that even though the arbitrator's decision was "manifestly unreasonable" in light of the negotiating history and the parties' thirteen-year custom and practice thereafter, it was not "irrational."

***Zelno v. Lincoln Intermediate Unit No. 12 Board of Directors*,** 786 A.2d 1022 (Pa. Commw. 2001)

Nancy Zelno was a teacher at Lincoln Intermediate Unit's (PA) residential drug and alcohol treatment facility for adolescent males. When the board learned she had been convicted a third time of driving under the influence and a second time of driving with a suspended license, they held a hearing and voted to terminate her for immorality and intemperance. Ms. Zelno filed suit to overturn the board's decision. A Pennsylvania appellate court upheld the board's decision to terminate her. The court rejected Ms. Zelno's argument that her conduct was not immoral. While conceding that a conviction for drunken driving is generally viewed as a serious mistake when it occurs in the first instance, the court pointed out that multiple convictions transformed it into immoral conduct. Regarding Ms. Zelno's contention that the board had not proved that her conduct corrupted the morals of her students or affected her ability to teach, it found that the board was not required to show that her conduct affected a specific student or her teaching ability. Rather, the court concluded that setting a bad example for her students and offending community morals were sufficient grounds for terminating her.

***Blount County Education Association v. Blount County Board of Education***, 78 S.W.3d 307 (Tenn. App. 2002)

The Blount County school board and the teachers' union were negotiating the contract terms for a new collective bargaining agreement. The union sought to negotiate several items, including retirement incentives, voluntary and involuntary transfer protection, fair treatment, non-discrimination, and duration of the agreement. The union asserted that these items all fell within "working conditions," making them mandatory bargaining subjects under state law. After several sessions with a federal mediator failed, the board declared negotiations had reached an impasse. It then made its final offer to the union. The union filed suit against the school board, seeking a court order to compel the board to bargain the disputed items. The union claimed that the board's failure to bargain these items constituted an unfair labor practice because the items were subject to mandatory bargaining under state law. The court found that the Tennessee legislature had set forth only eight "conditions of employment" subject to mandatory bargaining. With the exception of the duration of the agreement and non-discrimination provisions, a state appellate court ruled that the items raised by the union were not "working conditions" within the meaning of the state law and, therefore, not subject to mandatory bargaining.

***Winkler v. Tipton County Board of Education***, 63 S.W.3d 376 (Tenn. App. 2001)

Linda Winkler, an eighth grade teacher at Crestview Middle School (TN), was class sponsor. When class rings were ordered from Balfour, the company rebated a portion of the purchase price to the school. The rebated money was to be deposited in the school's general fund. Ms. Winkler asked the Balfour salesman if her name could be added to the rebate check. Ms. Winkler received the check the last day of school before Christmas vacation but never deposited it in the school's general fund. Instead she opened a separate account for the money and deposited it. When Ms. Winkler returned from the Christmas vacation, the principal asked her about the ring money. She explained the situation to him and obtained the money from her bank. The school board charged her with two infractions of school district policy: (1) unprofessional conduct by converting the school rebate check to her use by depositing it in a personal account; and (2) unprofessional conduct by failing to deposit the funds within three days. Following a hearing, the board voted to suspend her without pay for the remainder of the school year. Ms. Winkler filed suit, seeking reinstatement. She argued that the board voted to suspend her without first determining whether the evidence presented at the hearing proved she was guilty of unprofessional conduct. The court ruled that under state law, the board was required to first make findings of fact in regard to the charges against a teacher before voting to take disciplinary action. Based on the record of the board's deliberations, the court concluded that it was unclear whether the board was finding Ms. Winkler guilty of either or both charges. It pointed out that the board's discussion of the evidence appeared to focus primarily on how she had exercised poor judgment. As a result, the court found that it was impossible to determine if the board found Ms. Winkler guilty of poor judgment, or unprofessional conduct, on either or both of the charges. The state appellate court ordered her reinstatement.

***Nelson v. Weatherwax***, 59 S.W.3d 340 (Tex. App. 2001)

Ann Weatherwax, a special education teacher for the Fort Worth Independent School District (TX), allowed a wheelchair bound student to exit her classroom using an unsafe stepped exit. Earlier that day, she had been instructed by the principal not to allow wheelchair bound students to use the stepped exit and to direct them to use the ramped exit. The student was injured while trying to maneuver his chair down the step. Ms. Weatherwax was suspended with pay while the school conducted an investigation. She received notice that the school administration intended to recommend her termination to the school board. Shortly after, Ms. Weatherwax requested and received a temporary disability leave of absence. While she was still on disability leave, the board held a hearing and terminated her for good cause based on the wheelchair incident. She filed suit in state court, alleging that under the state's education code the board was prohibited from conducting a termination hearing while she was on disability leave. The court found that Ms. Weatherwax's termination was based on her failure to follow the principal's directive to prevent wheelchair bound students from using the stepped exit. It agreed with the hearing findings that Ms. Weatherwax's conduct constituted a failure to meet the school district's standards of professional ethics because she did not make reasonable efforts to protect the health and safety of the injured student. The state appellate court ruled that the board had not violated the section of the state education code cited by Ms. Weatherwax because her termination was for good cause unrelated to her disability.

***Weems v. North Franklin School District***, 37 P.3d 354 (Wash. App. 2002)

Dr. James Weems was the director of special education and school psychologist for North Franklin School District (WA). Dr. Weems, along with his administrative intern Sue Leschinski, altered documents in several students' files to make it appear that the school district had complied with state and federal special education laws. When the school district discovered discrepancies in the records, it terminated Dr. Weems for misconduct. A state appellate court upheld Dr. Weems's termination. It concluded that his conduct in altering and backdating student files to feign compliance with federal and state special education laws constituted sufficient cause for terminating his employment.

***Atlas Transit Inc. v. Korte***, 638 N.W.2d 625 (Wis. App. 2001)

A local television reporter contacted Atlas Transit Inc. and requested information regarding the backgrounds, credentials, and driving records of those employees driving school buses for the Milwaukee Public Schools (MPS). When Atlas refused the request, the reporter made an open records request to MPS for the roster of bus drivers, including each driver's full name and commercial driver's license number. After consulting with legal counsel, MPS released the information. Atlas filed suit, seeking a court order prohibiting MPS from releasing the driver information. Atlas argued against disclosure on the following grounds: (1) MPS failed to provide Atlas and the drivers with reasons for its decision to release the information; (2) an overriding public interest favored nondisclosure; (3) MPS failed to take into account the drivers' privacy and reputation rights, and Atlas's right not to disclose proprietary business information; and (4) federal and state law prohibited disclosure. Considering the drivers' privacy interests, the court found that the release of their names and commercial licenses was a slight invasion of privacy unlikely to embarrass individual drivers or compromise their safety. Regarding Atlas's claim that the information was proprietary business information, the court concluded: (1) that it was unlikely that competitors would be able to use the information to recruit drivers away from Atlas; and (2) even if they did, the public's right to know outweighed Atlas's business interests. Lastly, it rejected the argument that the federal Driver's Privacy Protection Act (DPPA) prohibited disclosure of the information. It found that DPPA was not applicable because it only prohibits state motor vehicle departments from disclosing driver information. Even if it was applicable, several of DPPA's exceptions, such as permitting disclosure in matters of motor vehicle or driver safety, would allow the school district to disclose the information. The state appellate court ruled that MPS was correct in deciding to release the drivers' records.

## DISCRIMINATION

### Circuit Court Opinions

***Baynard v. Malone***, 268 F.3d 228 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 1357 (2002)

In 1990, Catherine Malone, principal at Barrett Elementary School (VA), received information that Craig Lawson, a teacher at Barrett, had been sexually molesting students over the course of his career. Ms. Malone took no action and did not relay the information to anyone. In November 1990, the school librarian observed Mr. Lawson touching Jackson Baynard, a student in Lawson's class, in an inappropriate manner. A Barrett teacher also told Ms. Malone that she had heard from a neighbor that Mr. Lawson was a pedophile. In January 1991, Malone informed the assistant superintendent that she had received several reports that Mr. Lawson was a pedophile but did not mention the incident with Jackson Baynard. The assistant superintendent initiated a police investigation which eventually closed for lack of evidence. Shortly after, Mr. Lawson resigned from Barrett but continued to sexually abuse Baynard until Baynard entered college. When Baynard finally reported the abuse, Mr. Lawson was arrested and convicted. In April 1999, Baynard filed suit under Section 1983 and Title IX against the school district and several school officials. The Fourth Circuit Court of Appeals ruled that Principal Malone was liable under Section 1983 for Lawson's sexual abuse of Baynard because she had actual or constructive knowledge of the risk to Mr. Lawson's students of sexual molestation. Her failure to take action to eliminate further sexual abuse evinced deliberate indifference to the risk. The court concluded that the other administrators were not deliberately indifferent because they acted promptly to conduct an investigation. Addressing the school district's liability under Title IX, the court noted that the school district could only be held liable for teacher-student sexual harassment if it had actual notice of a substantial risk of ongoing sexual abuse. It concluded that there was an absence of actual notice; while Principal Malone should have been aware of the potential for sexual abuse, there was no evidence that she knew that a student was being abused.

***Grutter v. Bollinger***, 288 F.3d 732 (6th Cir. 2002), *petition for cert. filed,* (U.S. 2002)(No. 02-241)

Ruling in favor of the University of Michigan Law School, the Sixth Circuit Court of Appeals held that race could be used as a factor in its admission process. The university had appealed to the Sixth Circuit after the district court determined that the law school's use of race and ethnicity in its admissions decisions violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The law school contended that its interest in achieving a diverse student body is compelling under *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), and that its admissions policy is narrowly tailored to serve that interest. In *Bakke*, a divided Supreme Court said race could be used as a factor in university admissions, but refused to allow the use of quotas in attaining that diversity. Furthermore, *Bakke* recognized diversity as a compelling state interest that provides an environment of "speculation, experiment and creation." Reversing the district court, the Sixth Circuit majority stated, "*Bakke* remains the law until the Supreme Court instructs otherwise, we reject the district court's conclusion and find that the law school has a compelling interest in achieving a diverse student body."

***Billings v. Madison Metropolitan School District***, 259 F.3d 807 (7th Cir. 2001), *reh'g en banc denied*, (7th Cir. 2002)

The principal of John Muir Elementary School (WI) issued a memo instructing teachers to balance classes according to "gender, ethnicity, academic abilities, and special needs." Sue Perry, B.B.'s second-grade teacher, assigned B.B., an African-American student, to Nancy Zabel's third-grade class. Ms. Perry stated that she assigned B.B. to Ms. Zabel's class for two reasons: (1) B.B.'s parents wanted her placed with a teacher who would raise the academic bar, and Ms. Perry believed Ms. Zabel would set academic challenges for B.B.; and (2) B.B. had some negative incidents with special education students assigned to the other two third-grade teachers. When the new school year began, Ms. Zabel paired African-American students together based on her belief that African-American students worked better with a partner. B.B.'s parents objected to her placement in Ms. Zabel's class, and Ms. Zabel's pairing of African-American students. Based on remarks made by the principal, they also believed that B.B. was placed in the class to act as a role model for low-income African-American students in the class. The parents sued under Section

1983, alleging that B.B.'s equal protection rights were violated by the class placement and the student pairings. The Seventh Circuit Court of Appeals ruled that the assignment was race-neutral. The panel also rejected the African-American role model claim, finding that the principal's remarks were irrelevant because there was no evidence that Ms. Perry even considered B.B. as a role model. However, the court concluded that the parents had a valid claim based on Ms. Zabel's decision to pair African-American students together. It pointed out that Ms. Zabel admitted to a race-conscious seating arrangement in her classroom which violated B.B's equal protection rights.

***Haugerud v. Amery School District*,** 259 F.3d 678 (7th Cir. 2001)

When the Amery School District eliminated Faye Haugerud's day custodial position at the middle school, the veteran employee took advantage of her seniority rights to bump a male custodial employee, Norm Fougner, from the day shift at the high school. Mr. Fougner, upset that he had lost his position, spoke to District Administrator Ray Norsted. Mr. Norsted told him that he would try and get him back on the day shift. Ms. Haugerud refused Mr. Norsted's request to voluntarily give up the day shift position and accept the afternoon shift at the middle school. The principal of the high school informed Mr. Norsted that he did not want her at the high school because she was not qualified. Ms. Haugerud claimed to be the target of several incidents involving discrimination and harassment: (1) Mr. Norsted and Mr. Fougner's intent to force her to give up the day shift position; (2) instructions to male custodians to not assist female custodians; and (3) additional duties and responsibilities assigned to her and not to male custodians. Ms. Haugerud filed suit under Title VII against the school district. She alleged sex discrimination and sexual harassment based on hostile work environment. The circuit court of appeals ruled that Ms. Haugerud did not have a valid claim for sex discrimination because she could not establish that she had been subjected to an adverse employment action. However, the court upheld Ms. Haugerud's sexual harassment claim. It found that she had provided ample evidence of harassment by a male superintendent, male principal, male supervisor, and the male night custodians. Specifically, the court found that both supervisors and co-workers plotted to force her to quit, interfered with her performance, increased her duties, withheld assistance, and questioned the ability of a woman to perform the day shift job. It concluded that the school district did nothing to investigate or remedy the complaints made by Ms. Haugerud. As a result, the court ruled that a hostile environment was created for which the school district was vicariously liable because it "negligently failed to take reasonable steps to discover or remedy the harassment."

***Schroeder v. Hamilton School District*,** 282 F.3d 946 (7th Cir. 2002)

Tommy Schroeder, a veteran teacher with the Hamilton School District (WI), came "out of the closet" in 1990. Both students and parents harassed him, causing Mr. Schroeder to suffer a "mental breakdown" and resign. Mr. Schroeder filed suit against the school district. The circuit court of appeals rejected Mr. Schroeder's harassment claim. It concluded that the Hamilton School District had taken immediate and reasonable steps to prevent the harassment. It disciplined students identified as harassers and instructed teachers and staff to be on the lookout for incidents of racial and sexual orientation harassment. The court pointed out that the school district's liability did not turn on whether its actions were ultimately successful, but rather on whether the actions could be characterized as prompt and reasonable.

***Parents Involved in Community Schools v. Seattle School District 1*,** 294 F.3d 1085 (9th Cir. 2002)

The Ninth Circuit Court of Appeals granted a rehearing on its previous decision regarding the Seattle School District's student assignment plan. The court had previously found that the plan violated the Washington Civil Rights Act because it uses race as factor. The Act in part prohibits the use of race to discriminate or grant preferences in providing educational programs. To prevent de facto segregation created by housing patterns in the city and to promote racial diversity in its high schools, the school district adopted a multi-step, open choice student assignment plan. Under the plan, if a high school has more applicants than seats, four tiebreakers are employed to determine whether individual students will be admitted. Parents of white students who were denied admission to their school of choice filed suit. At issue in the case was the second tiebreaker – the student's race. The racial tiebreaker grants a preference to applicants whose race is under-represented at the school they have chosen, while denying admission to students whose race is over-represented. The circuit court of appeals found that the language of the Act clearly prohibits the school district's use of race as a factor.

***NAACP v. Duval County School***, 273 F.3d 960 (11th Cir. 2001), *reh'g enbanc denied*, 31 Fed. Appx. 943 (11th Cir. 2002)

In 1963, a federal court ordered the Duval County (FL) school system desegregated after finding that the county was operating a *de jure* dual school system. In 1971, the court ordered the county to implement mandatory reassignment of students to achieve racial balance by means of busing. In 1990, both the plaintiffs in the original suit and Duval County agreed that busing was no longer achieving the desired results. Therefore, they decided that students should be assigned to schools based on local attendance zones. However, for the Duval County Schools to achieve unitary status and be released from the court's desegregation order, the parties negotiated a "corrected stipulation and agreement." This document contained a roadmap for Duval County to achieve unitary status. Unitary status is achieved when a court finds that a school district has complied in good faith with the desegregation decree and has eliminated the vestiges of *de jure* segregation to the extent practicable. The circuit court of appeals found that Duval County had achieved unitary status and released it from the desegregation decree. It examined six factors: (1) student assignments; (2) facilities; (3) faculty; (4) staff; (5) transportation; and, (6) extracurricular activities. It pointed out that any remaining racial imbalance resulted from demographic factors outside the county school district's control.

## Federal District Court Opinions

***Berry v. School District of the City of Benton Harbor***, 206 F. Supp. 2d 899 (W.D. Mich. 2002)

In April 2002, a federal district court in Michigan declared that Benton Harbor Area School District (MI), which had been under a court ordered desegregation plan for 22 years, had achieved unitary status. The court ruled that the school district eliminated the last vestiges of desegregation through improvements in the performance level of minority students, even though the district did not achieve equality in performance between white and minority students. The court stated that while equality was a desirable goal, it was not one enforceable by a court of law.

***Boston's Children First v. Boston School Committee***, 183 F. Supp. 2d 382 (D. Mass. 2002)

Several white students, and the advocacy group, Boston's Children First, filed suit against the Boston School Committee (MA). The students alleged that they were denied admission to their school of choice because of the school committee's use of race as a factor in assigning elementary and middle school students to the public schools. A federal district court dismissed Boston's Children First as a party for lack of standing to bring the suit, i.e., it failed to demonstrate that it sustained or was immediately in danger of sustaining a direct injury as a result of the school system's student assignment plan. The court also dismissed the individual students' claims seeking a court order directing the school committee to assign them to their school of choice. It found that the students' claims were moot because the individual students had either failed to request reassignment from the school system or had left the Boston public schools to attend another school district or private school. However, the court considered the students' claims for declaratory relief, i.e., a court order prohibiting the school committee from considering race when it makes future student assignments. The district court ruled that the students had a valid claim in light of the superintendent's statements that he arbitrarily reduced the number of walking zone preferences for schools in predominantly white neighborhoods so he could assign more minority students. It found that the superintendent's actions were nothing more than a back door attempt to continue using race as factor in making student school assignments, even after the school committee had eliminated the race factor from its formal student school assignment plan.

***C.R.K. v. Unified School District 260***, 176 F. Supp. 2d 1145 (D. Kan. 2001)

C.R.K. was a tenth grade student at Derby High School (KS). In December 1995, she contacted local law enforcement and alleged that her former boyfriend, Adrian Martin, had raped and assaulted her during the summer. Adrian was an eleventh grade student at Derby. Both students were members of the cheerleading team, Adrian on the varsity and C.R.K. on the junior varsity. In January 1996, C.R.K.'s parents met with the school's principal, Dr. Sowers, to inform him of the alleged rape and request that school personnel provide supervision so Adrian would not be left alone with C.R.K. The school took several steps to minimize contact between Adrian and C.R.K., such as scheduling varsity and junior varsity cheerleading at different times. Although the local prosecutor declined to charge Adrian with rape, he was charged and convicted of misdemeanor assault. In addition, the juvenile court judge imposed a "no contact order" on Adrian and his family. Over the next year, C.R.K. and her mother reported several incidents of harassment by Adrian, his family, and friends. In each instance, the school officials investigated and took action to prevent further harassment. C.R.K. filed suit against the school district, alleging that it was liable under Title IX for student-on-student sexual harassment. She contended that the school's failure to successfully remedy the continuing peer harassment demonstrated that school officials were "deliberately indifferent." The court concluded that while the school might have been more aggressive in investigating some of the reports of harassment, the school board was not guilty of "deliberate indifference" so as to subject it to liability under Title IX for student-on-student harassment. It found nothing unreasonable about the principal's decision not to take action on the alleged rape because it occurred off-campus while school was out of session and the matter was dealt with by law enforcement authorities. The school took numerous steps in an effort to address the reports of harassment that did occur at school. The federal district court dismissed the suit.

***Flores v. State of Arizona***, 172 F. Supp. 2d 1225 (D. Ariz. 2000)

In January 2000, a federal district court issued a declaratory judgment against the state of Arizona for failing to provide limited English proficient (LEP) students with a program calculated to make them proficient in speaking, understanding, reading, and writing English, while enabling them to master the standard academic curriculum required of all students. In the following months, the state legislature failed to provide the state department of education with the funding to conduct a study to determine the cost of implementing the state's *Lau* educational theory. (*See Lau v. Nichols*, 414 U.S. 563 (1974) (failure to provide English instruction to students of Chinese descent who do not speak English denies them a meaningful opportunity to participate in public education and violates Title VI, 42 U.S.C. Section 2000d.)) As a result, the *Lau* programs were removed from the list of permissible items to be funded by the state sales tax. The plaintiffs, parents of LEP students, filed a post-judgment motion requesting that the court order the state to conduct the cost study by November 1, 2000 so that the state legislature would fund the *Lau* programs during its next legislative session beginning January 1, 2001. The court granted the plaintiffs' motion, ordering that the cost study be prepared in a "timely" fashion so that the state legislature would be able to appropriate funding for *Lau* programs during the upcoming budget session in January 2001. It stated that it was granting the motion because "without judicial action, the federal law violations as set out will continue for at least another three years."

***Ranieri v. Highland Falls Fort Montgomery School District***, 198 F. Supp. 2d 542 (S.D.N.Y. 2002)

When James Ranieri, the boys' varsity basketball coach at James O'Neill High School (NY), was ousted from his coaching position in favor of a younger candidate, he filed suit under the Age Discrimination in Employment Act (ADEA). The school district contended that he did not have a valid claim because both individuals were over the age of 40. The federal district court found that the 10-year age difference was sufficient to state a claim of age discrimination. However, the court dismissed Mr. Ranieri's suit because he was unable to refute the legitimate, non-discriminatory reason articulated by the district for not rehiring him, i.e. the team's failing record.

***Weser v. Glen,*** 190 F. Supp. 2d 384 (E.D.N.Y. 2002), *aff'd,* 41 Fed. Appx. 521 (2d Cir. 2002)

Rubin Weser, a 79-year-old white male, applied for admission to City University of New York Law School in 1995, 1996, and 1997. On each occasion he was denied admission. Mr. Weser's suit claimed that the school's admission policy discriminated against him on the basis of race and gender in violation of Title VI and Title IX. Under the policy, applicants were grouped into two pools: those who scored 140 or above on the Law School Admission Test (LSAT); and, those with LSAT scores below 140. Pursuant to the policy, each year a maximum of eight applicants with scores below 140 could be offered admission. Because Mr. Weser's LSAT score was133, his application was placed in the second group. Each year he was denied admission because of his low LSAT score, academic record, and lack of demonstrated commitment to public service. The court concluded that the school's admissions policy was neither discriminatory on its face nor discriminatory as applied by members of the admissions committee. Addressing the facial challenge to the policy, the court found the policy devoid of any quotas or preferences by race or gender, or set aside seats for minorities. The court conceded that the school's policy referenced its desire for diversity but found nothing in the policy that created less rigorous admissions standards based on race, national origin, or gender, or set aside seats for members of such groups. The district court dismissed Mr. Weser's suit.

## State Lower Court Opinions

***Crawford v. Huntington Beach Union High School District,*** 121 Cal. Rptr. 2d 96 (App. 2002)

Huntington Beach Union High School District's (CA) open transfer policy had a "racial and ethnic balance" component as required by the California Education Code. The "racial and ethnic balance" provision requires a one-for-one same race exchange policy in any school identified as "ethnically isolated." Donald Crawford, a taxpayer, filed suit. He claimed that the one-for-one same race provision violated both the state and federal constitutions. A California Court of Appeals agreed with Mr. Crawford, ruling that the one-for-one same race exchange policy violated the state constitution's prohibition on racial discrimination. The court found that the policy created different transfer criteria for students solely on basis of their race. As a result, it concluded that the policy clearly violated Proposition 209's proscription on discriminating against individuals or groups in public education on the basis of race. The court rejected the school district's contention that it was required by the equal protection clause in both the state and federal constitutions to implement its race-based transfer policy. Because it found that the ethnic isolation was not the product of intent to segregate, the court concluded a race-based "desegregation" plan was not required by equal protection considerations under either the state or federal constitution.

***Paynter v. State,*** 735 N.Y.S.2d 337 (App. Div. 2001), *appeal dismissed,* 771 N.E.2d 832 (N.Y. 2002)

Fifteen students in the Rochester City School District filed a class action suit on behalf of all district students against the State of New York. They alleged that the state law that only gives students the right to attend schools in the district where they reside discriminates against students who reside in school districts with a high concentration of poor and minority students because schools in these districts suffer from "wholesale academic failure." They claimed that such discrimination violated the education article of the state constitution, which requires the state to maintain and support a system of public schools where all children can be educated. A state appellate court rejected the students' claim. It ruled that their allegation that the law led to a "wholesale academic failure" was insufficient to state a claim under the education article of the state constitution because the students failed to allege that minimally acceptable educational services and facilities were not being provided in their school district, as required to implicate the constitutional provision. The court also pointed out that the system of residential education being challenged was the very system that was "constitutionalized" by the state's adoption of the education article in 1948.

## SCHOOL PROPERTY, FINANCE, & REFORM

### Circuit Court Opinions

***Campbell v. St. Tammany Parish School Board,*** 300 F.3d 526 (5th Cir. 2002)

Last year the U.S. Supreme Court vacated the Fifth Circuit Court of Appeals decision in *Campbell v. St. Tammany Parish School Board.* In that case, the Fifth Circuit had ruled that the district's policy prohibiting non-student use of school district buildings for "religious instruction" and "religious worship" was constitutional. The Supreme Court instructed the Fifth Circuit to reconsider the case in light of the Supreme Court's ruling in *Good News Club v. Milford Central School.* (In that case, the Court held that a school district's refusal to allow a group to use school facilities solely because of its religious viewpoint violated the group's First Amendment free speech rights.) The Fifth Circuit sent the case back to the district court. With the order sending the case back to the lower court, one Fifth Circuit judge expressed the opinion that both St. Tammany's policy and the group's planned use of the facilities could be distinguished from those in *Good News*. The St. Tammany policy, unlike Milford's, did not require "school officials to impose their own characterization on the applicant's proposed use" because the policy specifically prohibited use for "religious services or religious instruction." Also, unlike *Good News*, the plaintiffs in the present case expressly sought permission to hold a prayer meeting during which they would "worship the Lord in prayer and music."

***Lipscomb v. Columbus Municipal Separate School District,*** 269 F.3d 494 (5th Cir. 2001), *reh'g enbanc denied,* 277 F.3d 1375 (5th Cir. 2001), *cert. denied,* 122 S.Ct. 1541 (2002)

Prior to Mississippi being granted statehood, Congress set aside land in the Mississippi Territory to be used for the benefit of schools. After Mississippi entered the union, it began leasing the land to generate revenue for the public schools. The leases were for 99 years and contained "renewable forever" provisions. Present day leaseholders continued paying yearly lease rates based on the properties' 19th century value which was a small fraction of its current fair market value. Relying on a state constitutional provision which prohibits the state from donating state lands to private parties, the state notified leaseholders that it intended to void the leases and renegotiate rates at current market value. Randolph Lipscomb, representing a class of leaseholders, filed suit. The circuit court of appeals concluded that voiding the leases under the state constitutional provision would substantially impair the rights of leaseholders and was not reasonable and necessary. As a result, the court ruled that the state's intended action violated the Contract Clause of the U.S. Constitution.

***Robinson v. State of Kansas,*** 295 F.3d 1183 (10th Cir. 2002)

The Tenth Circuit Court of Appeals ruled that the State of Kansas does not enjoy sovereign immunity from a lawsuit claiming that the state's school financing scheme violates minority and disabled students' rights under the Fourteenth Amendment, Section 504 of the Rehabilitation Act, and Title VI of the 1964 Civil Rights Act. The Tenth Circuit concluded that Kansas waived its sovereign immunity to Section 504 claims when it accepted federal financial assistance. The court found that the plaintiffs could sue the state under Title VI and the Fourteenth Amendment because the claims seek prospective injunctive relief against state officials in their official capacities rather than monetary damages for past wrongs. The court also noted that the Title VI claim could be salvaged, even though the Supreme Court ruled in *Alexander v. Sandoval,* 532 U.S. 275 (2001), that private individuals cannot bring disparate impact claims directly under Title VI. The plaintiffs may amend their complaint to allege the Title VI violation under 42 U.S.C. Section 1983, a federal statute allowing suits for alleged violations of federal rights.

## State Supreme Court Opinions

***Chambers County Commission v. Chambers County Board of Education***, 2002 WL 1773040 (Ala. 2002)

After the Chambers County Commission (AL) tabled the board of education's request to hold a referendum on its proposal for a special school district tax, the board sued in state court. It sought to compel the commission to hold the vote, saying that under the state constitution, the commission was required to do so. In addition, it asserted that the state constitution authorized the board to set the rate and term of any assessment considered for public school purposes. The commission countered that school boards, as purely administrative bodies, have no power to levy or collect a tax unless such power has been expressly delegated to them by the constitution. The commission argued that because the constitution had not delegated such power to local school boards, the commission was the sole taxing authority for Chambers County. The Alabama Supreme Court ruled that local boards of education lacked the power under the state constitution to levy and collect taxes because boards are purely administrative bodies in nature, rather than legislative. The court concluded that any attempt by the state legislature to delegate the power to tax to school boards would be constitutionally impermissible, while such delegation to local legislative bodies, such as county commissions, would be upheld.

***Ex parte James***, 2002 WL 1150823 (Ala. 2002)

The Alabama Supreme Court dismissed a lawsuit by a group of taxpayers challenging the state's school funding scheme under state constitutional provisions. The court ruled that its involvement in directing the administration of school funds would constitute an intrusion into legislative matters in violation of the state constitution's mandated separation of powers.

***Richard Milburn Public Charter High School v. Cafritz***, 798 A.2d 531 (D.C. 2002)

The District of Columbia Board of Education voted to revoke the charters of Richard Milburn Public Charter School and World Public Charter School, Inc. The board informed the schools that they could request an informal hearing under the D.C. School Reform Act of 1995 (DCSRA). When the board denied the schools' request for a trial-type hearing rather than an informal hearing, the schools filed suit against the board. They claimed that under the District of Columbia Administrative Procedures Act (DCAPA) and the Due Process Clause of the Fifth Amendment, they had a right to a contested case hearing. The D.C. Court of Appeals rejected both claims. Addressing the claim based on the DCAPA, the court found that the law clearly states that contested case hearings are mandated when, "required by a law other than [the DCAPA]." Turning to the due process claim, the court, after balancing the private and governmental interests at stake, concluded that due process considerations do not require a contested case hearing before revoking a school's charter.

***Allen v. State of New Hampshire***, 785 A.2d 901 (N.H. 2001)

Taxpayers residing in local cooperative school districts filed suit against the State of New Hampshire, alleging that differing tax rates within cooperative school districts violated the proportional and reasonable taxation provision of the state constitution. The New Hampshire Supreme Court ruled that it was permissible for tax rates to vary. The court found that taxes assessed by individual towns were for educational services beyond those that the state is constitutionally required to provide for students and thus not covered by the "proportional and reasonable" taxing requirement.

***Grimes v. City of Oklahoma City***, 49 P.3d 719 (Okla. 2002)

In 1999, the Oklahoma state legislature enacted a law allowing municipalities to support public school systems located in whole or in part within the corporate limits of the municipality. This law authorized municipal governing bodies to "take all actions necessary to effectuate such support." Taxpayers in the cities of Oklahoma City, Lawton, and Ardmore challenged the validity of this law and city ordinances enacted to use sales tax revenues to support public schools. The Oklahoma Supreme Court ruled that both the state law and the ordinances were constitutional. The court rejected the taxpayers' argument that the

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state constitution limited the funding of public school systems to state funds. The court concluded that the state law authorized municipalities to levy sales taxes for public schools. The court pointed out that the word "support" in the state law implies financial support "which necessarily implies the power to levy taxes."

***Horry County School District v. Horry County***, 552 S.E.2d 737 (S.C. 2001)

Horry County (SC) along with three contiguous counties created a multi-county business park (MCBP). Because the property within the MCBP was exempt from property taxes under South Carolina's constitution, the county collected a fee equivalent to the property taxes otherwise due. The Horry County School District had the authority to levy property taxes for school purposes. The school district levied at the rate of 67% for all property tax revenue for unincorporated areas of the county and 53% for incorporated areas. However, under the agreement creating the MCBP, the school district received 50% of the revenue collected from the fee without regard to the property tax percentages it would otherwise levy. The school district filed suit against the county, claiming that it was entitled to an amount of the fees in proportion to the tax rate it levied. Rejecting the school district's contention that the MCBP statutes violated the state constitution, the South Carolina Supreme Court ruled that under the statutes providing for creation of MCBPs, the county had discretion over the allocation of fees that landowners pay to the county in lieu of taxes on exempt property in MCBPs. As a result, the court found that Horry County had the statutory authority to allocate a smaller proportion of the fees to the school district than the district would have received in property taxes.

***Southern Constructors, Inc. v. Loudon County Board of Education***, 58 S.W.3d 706 (Tenn. 2001)

Southern Constructors, Inc. (SCI) was hired by the Loudon County Board of Education (TN) for additions and renovations to two county school buildings. A SCI subcontractor ruptured an electrical cable damaging electrical equipment at the school and interrupting power to another building. SCI repaired the damaged lines and equipment at no cost to the board. Approximately two months later, a board employee discovered mold and mildew in a section of the school building that had been without electricity following the accident. When SCI refused to pay for the mold and mildew removal and repair, the board withheld the cost of the work from the balance owed SCI. After SCI and the board were unable to mediate a settlement, SCI requested that the board agree to arbitration. The board agreed and the arbitrator found in favor of the board. SCI filed suit to set aside the arbitrator's decision, arguing that under state law the board lacked the authority to enter into an agreement to arbitrate. The state supreme court ruled that county boards of education do have the authority to arbitrate construction contract disputes. It concluded that the authority was implied from boards' express power under state law to enter into construction contracts.

## State Lower Court Opinions

***Holmes v. Bush***, 2002 WL 1809079 (Fla. Cir. 2002)

Florida's Second Judicial Circuit ruled that the state's voucher program violates Article I, § 3 of the state constitution, which prohibits either direct or indirect aid to any sectarian institution. The program, the only statewide system in the nation, uses taxpayer funds to pay for religious school tuition. The court rejected the state's argument that since parents receive the voucher money first, the transfer of funds to religious schools is really a result of private choice. The restrictive endorsement by parents of tuition checks (co-made to both parent and religious school) is nothing more than a device to avoid payments directly by the state, the opinion observed. As a result, the court concluded that the endorsement process was a back door or indirect means of providing state funds to religious schools. The court cited the recent U.S. Supreme Court case of *Zelman v. Simmons-Harris* in a footnote, but was not influenced by its findings. Implicit in the circuit court's ruling was the idea that *Zelman* does not prevent states from taking a more stringent view than the federal Constitution in ensuring separation of church and state.

***Adair v. State of Michigan,*** 250 Mich. App. 691 (Mich. App. 2002)

The Michigan Court of Appeals ruled against 467 school districts that had joined together to sue the state for requiring programs, but not funding them. The districts cited some 70 state mandates they considered burdensome, including specialized services for students with autism, AIDS training for teachers, data collection and reporting, financial audits, and school breakfast programs.

***Durant v. State,*** 2002 WL 971875 (Mich. App. 2002)

The Michigan Court of Appeals ruled that the funding scheme in the amended State School Aid Act does not violate certain provisions of the state constitution. The appellate court framed the issue as "whether the total appropriation meets or exceeds the minimum funding levels imposed" by the state constitution. It concluded that the total appropriation made available to local school districts under the Act meets or exceeds the minimum funding levels mandated by the provisions in the constitution.

***Campaign for Fiscal Equity, Inc. v. State,*** 744 N.Y.S.2d 130 (App. Div. 2002)

In a surprising split opinion, a New York intermediate appellate court reversed a previous court's ruling that the state failed to provide "a sound basic education" for the school children of New York City. The court held that the public school children were receiving the sound basic education required and were being provided the minimum eighth grade education and preparation for low-level jobs. The court felt that the evidence was insufficient to prove that inadequate school facilities deprived students of an opportunity to acquire basic education skills and that any deficiencies in city schools were caused by the state funding system.

***Liberty Management of New York v. Assessor of the Town of Glenville,*** 728 N.Y.S.2d 262 (App. Div. 2001)

The Glenville Town Assessor and Liberty Management entered into a settlement agreement adjusting the tax assessment for 1996 to 2000 on a property owned by Liberty. Nisakayuna Central School District (NY) objected to the agreement and attempted to intervene in the tax proceeding, seeking judicial approval of the settlement. The trial level court ruled that the school district lacked the authority to veto the settlement agreement. However, an appellate court disagreed, holding that intervening school districts are equal parties in tax proceedings with the same rights as petitioners and respondents to accept or reject proposed settlements. Pointing out that a school district's right to participate in tax proceedings had long been recognized, the court concluded that the right would be rendered meaningless if school districts were not afforded the same control over the proceedings as the other necessary parties.

***Pennsylvania School Boards Association, Inc. v. Zogby,*** 802 A.2d 6 (Pa. Cmwlth. 2002)

A Pennsylvania appellate court has rejected a lawsuit filed by several local school districts challenging the legality of cyber charter schools under state law. Because the state's newly enacted charter school law does not give local non-charter school districts any role in granting or denying charter applications, the court held that the school districts have no legal stake and so cannot sue. The court stated that even if the school districts could sue to challenge the legality of cyber charter schools, the state's charter school law does not prohibit such schools.

## TECHNOLOGY

### Supreme Court Opinions

***Ashcroft v. ACLU***, 122 S. Ct. 1700 (2002)
http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol =000&invol=00-1293

**Issue:** Whether the provisions of the Child Online Protection Act (COPA) are substantially overbroad with respect to its "contemporary community standards" obscenity test.

**Facts:** After the Supreme Court struck down the Communications Decency Act (CDA) on constitutional grounds, Congress enacted new legislation, COPA, regulating material displayed on the World Wide Web. COPA applies to communications made for commercial purposes and regulates material that could be harmful to minors. The law contains a three-part obscenity test that requires jurors to apply "contemporary community standards" in assessing Internet material. The ACLU, representing plaintiffs who post sexually oriented material on the Web, challenged COPA on the ground that it is overbroad, thus violating the First Amendment. A federal district court issued a preliminary injunction barring enforcement of COPA. The Third Circuit affirmed, finding that the use of the "contemporary community standards" to identify harmful material rendered COPA overbroad.

**Holding:** The Supreme Court disagreed and vacated the decision of the Third Circuit, holding that the "community standards" test does not by itself render the statute substantially overbroad for First Amendment purposes. The Court held that its prior community standards jurisprudence has no applicability to the Internet because Web publishers cannot control the geographic scope of their communications. The Court pointed out that if a publisher chooses to send its material into a particular community, then it is the responsibility of the publisher to abide by that community's standards. The Court also stated that the publishers could avoid running afoul of particular community standards by using a medium that enables them to focus on specific communities where they are welcome.

***Ashcroft v. Free Speech Coalition***, 122 S. Ct. 1389 (2002)
http://supct.law.cornell.edu/supct/html/00-795.ZS.html

**Issue:** Whether the Child Pornography Prevention Act of 1996 (CPPA) is unconstitutional as substantially overbroad.

**Facts:** The CPPA expanded the federal prohibition on child pornography to include not only pornographic images made using actual children, but also "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct." The CPPA also banned any sexually explicit image that is advertised, promoted, presented, described, or distributed in such a manner that "conveys the impression" that it is depicting "a minor engaging in sexually explicit conduct." The Free Speech Coalition, an adult-entertainment trade association, filed suit against the federal government, claiming that the CPPA's ban on "virtual child pornography" is an unconstitutional limitation of their First Amendment rights because the terms "appears to be" and "conveys the impression" are substantially overbroad and vague. The district court did not agree however, and granted the government's motion for summary judgment. The Ninth Circuit Court of Appeals reversed the summary judgment, and held that the CPPA was unconstitutional because it bans materials that are neither obscene under the definition in *Miller v. California*, 413 U.S. 15 (1973), nor produced by the exploitation of real children as in *New York v. Ferber*, 458 U.S. 747 (1982).

**Holding:** The Supreme Court agreed with the Ninth Circuit holding that the CPPA was unconstitutional. The Court found the statute unconstitutionally overbroad as it prohibits speech that is neither obscene under *Miller* nor child pornography under *Ferber*. The majority rejected the government's reliance on *Ferber* based on its interest in preventing child pornography from being used as an aid in the solicitation of minors. On this issue, the majority concluded that unlike flesh and blood participants that the Court referred to in *Ferber* as "victims of child pornography," the CPPA prohibits speech that neither records crime nor creates victims by its production. The majority expressed sympathy for the government's desire to protect children from pedophiles, but it pointed out "the government may not suppress lawful speech as the means to suppress unlawful speech."

## Federal District Court Opinions

***American Library Association v. United States***, 201 F. Supp. 2d 401 (E.D. Pa. 2002)

A Pennsylvania federal district court ruled the Internet filtering provisions of the Children's Internet Protection Act (CIPA) violate library users' First Amendment free speech rights. CIPA requires libraries and schools to block access to pornographic material. To comply, libraries and schools would have to install filtering software that restricts patrons' access not only to pornographic materials but also to a substantial amount of protected speech. As a result, the court concluded that the filtering provisions are unconstitutional.

## STUDENT RIGHTS, SAFETY & DISCIPLINE

### Supreme Court Opinions

***Board of Education of Independent School District No. 92 of Pottawatomie County, Oklahoma v. Earls***, 122 S. Ct. 2559 (2002)
http://a257.g.akamaitech.net/7/257/2422/27jun20021045/www.supremecourtus.gov/opinions/01pdf/01-332.pdf

**Issue:** Whether a school district policy of drug testing students involved in extracurricular activities is unconstitutional.

**Facts:** Tecumseh School District in Pottawatomie County, Oklahoma implemented a mandatory drug testing policy for all public high school students participating in extracurricular activities. The policy required those students to consent to random, suspicionless drug testing via urinalysis. Two students, Lindsay Earls and Daniel James, challenged the policy on the ground that it violated their Fourth Amendment right to be free from unreasonable searches. The Tenth Circuit ruled that the school district's drug testing policy was unconstitutional. The court found that drug use by students involved in extracurricular activities other than athletics, such as band or choir, did not expose them to any greater safety risk than non-participants who use drugs. It also concluded that the school district's contention that it had an identifiable drug abuse problem among students involved in extracurricular activities was not supported by the record.

**Holding:** In a 5 to 4 decision written by Justice Thomas, the court concluded that the drug testing policy was constitutional. Although students participating in non-athletic extracurricular activities are not subject to the same level of physical intimacy and communal undress as student-athletes, they do "voluntarily subject themselves to many of the same intrusions of their privacy as do athletes." The Court also found that testing students participating in extracurricular activities is a reasonably effective means of addressing the school district's legitimate interests in detecting, deterring, and preventing student drug use

***Gonzaga University v. Doe***, 122 S. Ct. 2268 (2002)
http://supct.law.cornell.edu/supct/html/01-679.ZS.html

**Issue**: Whether an individual has the right to sue an educational institution for an alleged FERPA violation.

**Facts:** A Gonzaga School of Education student was suspected of committing a date rape. The results of the date rape investigation were turned over to the Gonzaga Dean of Education who established that there was adequate evidence supporting a serious behavioral problem by the student. She believed the problem prohibited her from signing the moral character affidavit supporting the student's application for teacher certification in the State of Washington. The student was not informed of the investigation until the dean notified him that she would not sign the moral character affidavit in light of the rape allegations. Additionally, the school informed the Washington State Office of the Superintendent of Public Instruction (OSPI) about the rape allegations. The student sued the university, alleging that the university violated his FERPA rights when it released the rape information to the OSPI. A state court jury trial returned a verdict for the student, which was reversed by the Washington State Court of Appeals. The Washington Supreme Court affirmed, conceding that FERPA itself does not give rise to a private cause of action but that it does give rise to a federal right enforceable under 42 U.S.C. Section 1983.

**Holding:** The Supreme Court reversed the decision of the Washington Supreme Court and held that a student may not sue a university for damages under §1983 to enforce provisions of FERPA. The majority stated that based on the statutory language of FERPA and its legislative history, there exists no individual right to sue. The focus of FERPA is on the aggregate, not the individual, and its provisions "serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions."

***Owasso Indep. Sch. Dist. v. Falvo***, 122 S. Ct. 934 (2002)
http://supct.law.cornell.edu/supct/html/00-1073.ZS.html

**Issue:** Does peer grading violate the provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA)?

**Facts:** Several Owasso School District teachers had students grade each other's assignments and tests (peer grading), and then call out the grades to the teacher in class. A parent with three children attending school within the district objected to the peer grading because it embarrassed her children. The superintendent refused to end the practice. The parent subsequently filed suit alleging the grading practice violated her children's right to privacy under the Fourteenth Amendment and FERPA. The district court granted the school district's motion for summary judgment, holding that peer grading did not implicate the student's right to privacy, and the grades were not "educational records" under FERPA. The Tenth Circuit reversed, holding that FERPA provided the parent with a cause of action because the grades marked by students on each other's assignments are "education records," and therefore, the very act of grading is an impermissible release of information to the student grader.

**Holding:** The Supreme Court vacated the Tenth Circuit decision, holding that peer grading does not violate the provisions of FERPA. The Court held that under FERPA the grades must be "maintained … by a person acting for [an educational] agency or institution." It said the definition would suggest that grades kept in a record room file or secure database would be covered. In this case, the Court said the student grades were not "maintained" but only handled for a few moments before being recorded by the teacher. Secondly, the Court took exception to the notion that the student graders were "acting for" the educational institution. The Court stated that the students were merely assisting the teacher when they graded assignments, not acting on behalf of the school as an institution.

## Circuit Court Opinions

***Gottlieb v. Laurel Highlands School District***, 272 F.3d 168 (3rd Cir. 2001)

Rhonda Gottlieb, a student at Laurel Highlands High School (PA), ignored the school security officer's order to leave the building. He escorted her to Assistant Principal Michael Carbonara's office. During an angry discussion with Rhonda, Mr. Carbonara pushed her shoulder with his hand, causing her to strike the door jam. Following the incident, Rhonda suffered from chronic back pain and cramping. Rhonda filed suit, claiming Mr. Carbonara used excessive force in violation of her civil rights. The circuit court of appeals rejected Rhonda's argument that Mr. Carbonara's push amounted to an unreasonable seizure under the Fourth Amendment. However, it found that she had a claim for excessive force under the Due Process Clause of the Fourteenth Amendment if the force used "shocked the conscience." The court then concluded that Mr. Carbonara's push was a minor use of force that certainly did not rise to the level of "a brutal and inhumane abuse of official power literally shocking to the conscience."

***Fuller v. Decatur Public School, Board of Education School District No. 61***, 251 F.3d 662 (7th Cir. 2001)

Six students from three different high schools in the Decatur School District (IL) engaged in a brawl during a high school football game. The students were expelled for violating the school district's rule prohibiting "gang-like" activity. The rule defined gang-like activity as "any conduct engaged in by a student 1) on behalf of any gang, 2) to perpetuate the existence of any gang, 3) to effect the common purpose and design of any gang, and/or 4) to represent a gang affiliation, loyalty or membership in any way while on school grounds or while attending a school function." The circuit court of appeals ruled that the students' expulsions for violating the gang activity rule did not violate their due process rights. The court rejected the students' contention that the gang-like activity rule was unconstitutional because it failed to clearly define what conduct was prohibited. It found that a school rule does not require the same degree of detail that criminal laws do because the sanctions imposed are not of a criminal nature. Pointing to the school district's need "to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process," the court concluded the rule was sufficiently clear to survive a constitutional challenge based on vagueness.

***Wooten v. Pleasant Hope R-VI School District***, 270 F.3d 549 (8th Cir. 2001)

Jana Wooten, a senior at Pleasant Hope High School (MO), was a member of the girls' softball team. When she was absent from a scheduled game without permission, her coach, Micki Stout, expelled her from the team. The following Monday, Jana and her mother met with the superintendent, principal, and Ms. Stout. After the meeting, the school district upheld the expulsion. Approximately a year after Jana graduated, she filed suit against the school district. She alleged that she had a constitutionally protected property right to participate in softball that was violated when the school district failed to hold a hearing before expelling her from the team. The court assumed, without deciding, that the right to participate in extracurricular activities was a property right protected by the Fourteenth Amendment's Due Process Clause. It then ruled that Jana's property interest in participating in extracurricular activities had not been violated because the meeting that was held constituted an adequate hearing for purposes of due process. The post-expulsion meeting satisfied due process requirements because it gave Jana an opportunity to be heard and offer an explanation for her absence.

***Cuesta v. School Board of Miami-Dade County***, 285 F.3d 962 (11th Cir. 2002)

Liliana Cuesta and other students at Kilian Senior High School (FL) distributed on school grounds an anonymous pamphlet titled, "First Amendment." The pamphlet contained an essay in which the author "wondered what would happen" if he shot the principal, a teacher, or other students. It also included cartoons depicting violence and sexual activity and disparaging comments about immigrants. The cover featured a graphic of Principal Timothy Dawson with a dart through his head. When the principal learned which students had created and distributed the pamphlet, he called them to his office for police questioning. All of the students admitted to being involved in producing and distributing the pamphlet. Principal Dawson indicated to the officers that if any crimes had been committed, he wished to prosecute. After consulting with the local prosecutor's office, Officer Alexander arrested the students on a felony charge of distributing publications that expose individuals or religious groups to racially motivated hatred, contempt or ridicule. Liliana was transported to a detention facility where she was booked and strip-searched in accordance with Miami-Dade County policy. The prosecutor's office decided not to file criminal charges. Liliana filed suit under Section 1983 against the school district and against Miami-Dade County. The Eleventh Circuit Court of Appeals ruled that neither the school district nor county could be held liable under Section 1983 for Liliana's arrest or strip search. Regarding her arrest, the court concluded that there was no constitutional violation. Turning to the strip search, the court found that the police had reason to search pursuant to standard procedures for those arrested on felony charges.

***Thomas v. Roberts***, 261 F.3d 1160 (11th Cir. 2001), *cert. granted and vacated*, 122 S. Ct. 653 (2001)

Sergio Evans, a fifth-grade student at West Clayton Elementary (GA), brought to school an envelope containing $26 for a school trip. When he noticed it was no longer on the table where he had placed it, he informed his teacher, Tracey Morgan. Ms. Morgan then asked the class if anyone had seen the money, but no one had. While she was searching for the envelope, Officer Zannie Billingslea of the Clayton County Police Department arrived to conduct a DARE program. Ms. Morgan went to the assistant principal, R.G. Roberts, and obtained his permission to conduct a physical search of the students in her class. She searched book bags, desks, and purses and required all the students to turn out their pockets and submit to a pat down of their person. Ms. Morgan and Officer Billingslea then conducted physical searches of each student's person. Officer Billingslea took the boys to the boys' restroom where they were required to pull their pants and underwear down to their ankles. Ms. Morgan took the girls to the girls' restroom and required them to lower their pants, raise their dresses or shirts, including pulling up their bras to expose their breasts. The envelope was not found. All the students searched filed suit against the principal, the assistant principal, Ms. Morgan, Officer Billingslea, the school district, and the county. They alleged that the searches had violated their Fourth Amendment search and seizure rights. The Eleventh Circuit Court of Appeals ruled that the searches violated students' search and seizure rights on two grounds: (1) neither Ms. Morgan nor Officer Billingslea had an individualized suspicion that pointed to a specific student or group of students at the time they conducted the search; and, (2) the alleged theft of $26 in the context of a grade school did not pose such an extreme threat to school discipline or safety to justify highly intrusive strip searches without individualized suspicion. Nevertheless, the court concluded that the individuals could not be held liable because the law was not "developed in such a factually defined context that they were acting illegally when they either ordered or performed" the strip searches. The court likewise found that the county was not liable for Officer Billingslea's illegal searches based on either the failure to properly train, supervise, investigate or discipline.

## Federal District Court Opinions

***Marner v. Eufaula City School Board***, 204 F. Supp. 2d 1318 (M.D. Ala. 2002)

Hunter Marner was a student a Eufaula High School (AL). After a police drug-sniffing dog alerted to Hunter's car, school officials and local police conducted a search of the vehicle. The search yielded an exacto blade and pocketknife. Hunter was suspended and transferred to an alternative school for possessing weapons on school property. Hunter filed suit in federal district court against the school district, alleging his Fourth Amendment search and seizure rights had been violated. The court sided with the school district. First, the court found that under the *T.L.O.* standard, school officials are not required to have probable cause to conduct a search. Second, it stated that it was bound by the Eleventh Circuit Court of Appeals' ruling in *Hearn v. Board of Public Education*, 191 F.3d 1329 (11th Cir. 1999), "that the alerting of a drug-sniffing dog to a person's property supplies not only reasonable suspicion [satisfying the *T.L.O.* standard], but probable cause to search that property."

***Bell v. Marseilles Elementary School***, 160 F. Supp.2d 883 (N.D. Ill. 2001)

Jacob Caputo, an eighth grade student at Marseilles Elementary School (IL), discovered after gym class that he was missing approximately $61 in cash. After Jacob informed Bradley Guilinger, the gym teacher, that the money was missing, two more students reported that their money was missing. Mr. Guilinger searched the locker room. Jacob's money was eventually found in an abandoned locker. However, the money belonging to the other two students was not found. Mr. Guilinger notified Assistant Principal Christopher Mehochko about the missing money. Mr. Mehochko called the police who dispatched Officer Dale Long to the school to investigate. Officer Long asked the students to identify the person responsible for the missing money. When none of them responded, he began searching each student. The search, which was conducted behind a partitioned area of the locker room for privacy, consisted of Officer Long having the students empty their pockets, remove their shoes and socks, either lift or remove their shirts, and in some cases lower their pants. He did not find the money. Eight of the students filed suit against the school district and Officer Long. A federal district court ruled that Officer Long's search violated the students' rights under the Fourth Amendment regardless of whether the searches were judged by the reasonable suspicion standard applied to school searches or the more stringent probable cause standard applied to police searches. The court noted that Officer Long's threat of possible arrest made it more likely that the search should be judged by the probable cause standard. But even using the reasonable suspicion standard, the court concluded the searches were not justified from their inception because there was no individualized suspicion. It found that the search was targeted at the class as a whole which was not sufficient to establish individual suspicion. The court also found that missing money did not justify the strip search. Thus, the court held the search violated the students' constitutional rights.

***Daniel S. v. Board of Education of York Community High School***, 152 F. Supp. 2d 949 (N.D. Ill. 2001)

Daniel S., a student with multiple emotional and mental disorders, attended York Community High School (IL). When Daniel and another student ripped their swimsuits during gym class, their instructor, Joseph Newton, ordered them to leave the pool and sit on the deck for the rest of the gym period. After the period ended and the other students had showered, Mr. Newton made Daniel and the other student remove their suits and stand naked by the showers in full view of their classmates. They were left standing approximately 15 minutes while another class entered the locker room. A week later, Mr. Newton told members of the cross-country team he coached that the two students he had kicked out of swimming class were like the kids at Columbine and referred to them as "Littletons waiting to happen." Daniel filed suit against the school district, claiming that his Fourth Amendment rights and Fourteenth Amendment substantive due process rights had been violated when Mr. Newton forced him to stand naked in the shower area. In addition, he claimed that Mr. Newton's later remarks about him to the cross-country team violated FERPA. A federal district court ruled that Mr. Newton's actions constituted an unreasonable search under the Fourth Amendment. While the court conceded that teachers have the power to restrict students' movement to maintain order and discipline, it concluded that Mr. Newton's actions went beyond any reasonable use of his power by ordering Daniel and his classmate to stand naked and leaving them in the locker room in plain view of their classmates for an indefinite period of time. However, the court dismissed the due process claim because it was based on the same conduct covered in the Fourth Amendment claim. It stated that where a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under that provision rather than as a substantive due process claim. The court also dismissed the FERPA claim, ruling that FERPA applies only to policies or practices that permit unauthorized disclosure of students' educational records. It pointed out that the school community had already learned of Daniel's humiliation independently of Mr. Newton's remarks, and that information he disclosed to the cross-country team did not derive from school records.

***Fewless v. Board of Education of Wayland Union Schools,*** 208 F. Supp. 2d 806 (W.D. Mich. 2002)

Joseph Fewless, a student at Wayland Union High School (MI), was subjected to a strip search after two students informed the assistant principal that Joseph had told them he had hidden marijuana in his "butt crack." The assistant principal and a school security officer conducted the search. They claimed that Joseph voluntarily consented to the search. No marijuana was found. Joseph sued the school district, the assistant principal, security officer, and other school district officials for violating his Fourth Amendment rights. The district court ruled that the search violated Joseph's right to be free from unreasonable search and seizure. He had not voluntarily consented to the search, nor did school officials have a reasonable suspicion that he was concealing marijuana on his person. The court found that any consent could not have been voluntary because Joseph was a special education student with learning disabilities "in a situation akin to police custody." It also pointed out that Joseph was not informed of the intrusive nature of the search. The court found that school officials did not have a reasonable suspicion of wrongdoing because Joseph's accusers had personal animus against him and the assistant principal failed to gather any other evidence supporting their claims.

***Coy v. Board of Education of the North Canton City Schools,*** 205 F. Supp. 2d 791 (N.D. Ohio 2002)

Jon Coy, a middle school student, was initially suspended and later expelled from school for 80 days. At the time Jon was suspended, he was informed that he had violated the obscenity, disobedience, and inappropriate action or behavior sections of the student conduct code. In its expulsion letter, the school district stated that his "inappropriate website" was the school district's major concern. The website was created on his home computer and on his own time. Jon filed suit, claiming that the school district violated his First Amendment freedom of expression rights. The school district countered that it did not discipline him for creating and posting the website, but rather because he displayed vulgar speech at school and violated the school's Internet use policy by accessing an unauthorized website on a school computer. The court stated that the district could restrict Jon's freedom of expression if it could demonstrate that his speech "materially and substantially interfered with the requirements of appropriate discipline in the operation of the school." The court also addressed Jon's claims that the school discipline policy was unconstitutionally vague. As to the obscenity and disobedience sections, it ruled that they were not vague on their face, but might be unconstitutional as applied if Jon could demonstrate that the school was motivated by a desire to close down his website rather than disciplining him for the accessing the website on school premises. Regarding the inappropriate action section, the court found it unconstitutionally vague on its face because the section does not define "inappropriate" or give any indication to students what activity might be inappropriate.

***Doe v. DePalma***, 163 F. Supp. 2d 870 (S.D. Ohio 2000)

James Doe, a male sixth grade student in the Centerville, Ohio school system, received detention and a written notation was placed in his file for harassment after he wrote an obscene, sexual comment in a female student's yearbook. His comment stated, "I just sniffed your crack." His parents filed suit against the school district, alleging that the school's disciplinary action violated James's free speech rights. A federal district court dismissed the suit, ruling that the school did not violate James's rights. The court concluded that the parents had conceded that James's yearbook comment was not protected speech because they agreed that the school was entitled to punish him for his "inappropriate behavior." As a result, it found that the principal's notation in James's file that he had engaged in "harassment" did not constitute a violation of James's free speech rights

***Brian A. v. Stroudsburg Area School District,*** 141 F. Supp. 2d 502 (M.D. Pa. 2001)

Brian A., a tenth-grader at Stroudsburg High School (PA), was suspended and later expelled after a teacher found a note written by Brian that stated, "There's a bomb in this school. Bang Bang!!" Brian filed suit against the school district, alleging violations of his due process and Fifth Amendment rights in connection with both the suspension and expulsion. With respect to the suspension, the court found that the assistant principal and school police officer had provided Brian with sufficient notice and a hearing to satisfy his due process rights. The assistant principal and police officer showed Brian the note, told him what charges he was facing, and gave him an opportunity to tell his side of the story. Likewise, the court concluded that the notice and hearing provided before Brian was expelled was adequate. It rejected Brian's contention that he had a fundamental right under the U.S. Constitution to a public education, stating that the U.S. Supreme Court explicitly ruled that there was no fundamental right to attend public school. Finally, the court ruled that Brian's Fifth Amendment right against self-incrimination was not violated when he confessed to writing the note without receiving *Miranda* warnings or having a parent or attorney present. Under the U.S. Constitution, students facing disciplinary action are not entitled to *Miranda* warnings. Thus, the court upheld the school's actions.

***Walker-Serrano v. Leonard,*** 168 F. Supp. 2d 332 (M.D. Pa. 2001)

Amanda Walker-Serrano, a third grade student at Lackawanna Trail Elementary School (PA), objected to a planned field trip to the circus because of her belief that the animals were subjected to cruelty. Amanda brought a petition to school to gather signatures from classmates to change the field trip. She was prohibited from circulating it on school grounds during school hours. On one occasion, a teacher stopped Amanda from gathering signatures on the playground during recess after a student fell on an icy patch near where Amanda was showing the petition to classmates. On another occasion, Amanda's teacher instructed her to put away her petition after a group of students gathered around Amanda's desk instead of reading quietly as they were instructed. Amanda filed suit against the school district, the school board president, the superintendent, the principal, and the playground teacher. She claimed that the school's refusal to allow her circulate her petition violated her First Amendment free speech rights. A federal district court ruled that the school's refusal to allow Amanda to circulate the petition on school grounds during school hours did not constitute a violation of her free speech rights. The court noted that there were no cases directly dealing with an elementary school student's right to petition at school. However, it found that Amanda's attempts to circulate affected legitimate school concerns on at least two occasions. The court concluded that the age of the students plays a significant role in determining the extent to which school officials can limit students' fundamental rights. Just as high school students' rights are more limited than those of adults based on their relative level of maturity, so too are elementary students' rights limited in comparison to high school students.

***Bundick v. Bay City Independent School District,*** 140 F. Supp. 2d 735 (S.D. Tex. 2001)

When a drug-sniffing dog alerted to a student's truck in the parking lot of Bay City High School (TX), school officials conducted a search of the truck and found an illegal knife. The student, David Bundick, was subsequently expelled from school. A federal district court rejected David's contention that the search violated his Fourth Amendment rights because it was a warrantless search conducted without legal justification or his consent. The court ruled that under the relaxed standard applicable to searches and seizures on school property, the search of his truck was justified from the inception because a trained dog's alert to the truck created a reasonable suspicion that it contained something illegal, thus, eliminating the need for either a warrant or consent.

## State Supreme Court Opinions

***In re Randy G.***, 110 Cal. Rptr. 2d 516 (2001)

While walking between buildings of the high school, Campus Security Officer Cathy Worthy observed Randy G. and another student. When she approached them, she noticed that Randy fixed his pants' pocket in a nervous manner. After following him to his classroom, she summoned another officer. They entered the room and asked Randy to step into the hall. He consented to a search of his bag that yielded nothing. He then consented to a pat down of his person. During that search, the other officer discovered a knife with a lockdown blade. Randy was charged and found guilty of possessing a knife with a locking blade on school grounds. The state supreme court ruled that the detention of Randy, a minor student, by campus security on school grounds did not violate the Fourth Amendment because it was not arbitrary, capricious, or for the purpose of harassment. It stated that individualized suspicion was not required for school personnel to detain students on school grounds. As a result, the court concluded there were no constitutional grounds for finding that the seizure of the knife was unreasonable. The court also rejected Randy's argument that school security officers should be held to the reasonable suspicion standard when they detain students rather than the arbitrary-capricious standard applicable to other school personnel. The court stated that if it drew such a distinction, "the extent of a student's rights would depend not on the nature of the asserted infringement, but on the happenstance of the status of the employee who observed and investigated the misconduct."

***Northwestern School Corp. v. Linke***, 763 N.E.2d 972 (Ind. 2002)

The Indiana Supreme Court upheld a district's policy requiring random drug testing of students who participate in extracurricular activities. It used the *Vernonia School District v. Acton*, 515 U.S. 646 (1995), analysis, weighing three factors: (1) the nature of the privacy interest that the search intrudes on; (2) the character of the intrusion; and, (3) the nature and immediacy of the government concern. The court acknowledged that the voluntary nature of participating in extracurricular activities lowered the privacy expectation for participants. The Indiana Supreme Court concluded that the school district had articulated a legitimate concern in preventing drug use and had demonstrated that random testing was a reasonable means for achieving prevention.

***In the Matter of L.A.***, 21 P.3d 952 (Kan. 2001)

Louise Herrington, assistant vice principal at Campus High School (KS), received information from a Crime Stoppers organizer that a student named L.A. had marijuana concealed in the headband of his baseball cap. Paul Schmidt, a school security guard, brought L.A. to Ms. Herrington's office. When she told L.A. she had been informed that he had drugs, he denied it. Ms. Herrington then telephoned L.A.'s mother who agreed to a search of L.A. Ms. Herrington and Mr. Schmidt conducted a search that netted a packet of diazepam, marijuana, and Valium. Mr. Schmidt questioned L.A. without giving him *Miranda* warnings. L.A. received *Miranda* warnings only after a deputy sheriff arrived to take him into custody. A juvenile court adjudicated L.A. a juvenile offender for possession of the marijuana and the diazepam. The Kansas Supreme Court upheld the charges. The court found that the circumstances satisfied the reasonable suspicion standard to conduct a search in a school setting. Regarding the lack of *Miranda* warnings by Mr. Schmidt, the court concluded that school security officers are not required to give *Miranda* warnings because their primary function is not law enforcement.

***Commonwealth v. Buccella***, 751 N.E.2d 373 (Mass. 2001) *cert. denied*, 122 S. Ct. 810 (2002)

Domenic Buccella, a special education student at East Bridgewater High School (MA), engaged in a pattern of disruptive behavior that included racial slurs directed at his teacher, Shirley Phillips. In September 1997, someone wrote racial slurs on the blackboard in Ms. Phillips' classroom. Domenic was identified as one of many suspects. In October 1997, the school was vandalized twice with obscene words and wavy lines written on the hallway walls. Photographs were taken on all occasions. After the vice principal completed an internal investigation, he informed the police that Domenic was suspected of committing the vandalism.

The police conducted a handwriting analysis of Domenic's handwriting from samples of schoolwork papers provided by the vice principal. Based on the results of the analysis, the police charged Domenic with malicious destruction of property and violation of civil rights. The state supreme court rejected Domenic's claim that the papers were protected from disclosure based on an expectation of privacy in his handwriting. It found that no such expectation of privacy existed because handwriting is repeatedly shown to the public. The court also rejected Domenic's argument that his school work papers were protected because they constituted "student records" under state law. It concluded that homework and other written student work assignments do not come within the definition of "student records" and, therefore, are not protected by the confidentiality provisions of state law. The court dismissed Domenic's final claim that the school had engaged in an illegal search when the vice principal turned his papers over to the police. While granting that Domenic had a reasonable expectation of privacy in regard to written schoolwork in the possession of the school, the court found that the search, i.e., providing the school papers to the police, was justified because the vice principal had reasonable grounds for believing that analysis of his handwriting by the police would lead to evidence that Domenic had violated the law. In January 2002, the U.S. Supreme Court denied review in the case.

***Doe v. Superintendent of Schools of Stoughton*,** 767 N.E.2d 1054 (Mass. 2002)

John Doe, a high school student, was suspended after the school's principal learned that John had been charged with an off-campus sexual assault of a six-year-old child. The principal informed John's parents by letter of the decision to suspend him pending resolution of the criminal charges. The principal informed them that John posed a threat to the safety, security, and welfare of the student body, and that the principal could not risk a similar incident occurring at school. The school district's superintendent upheld the suspension after holding a hearing. John's parents filed suit, seeking John's reinstatement. They alleged that state law required more than a felony charge to impose a suspension. The Massachusetts Supreme Judicial Court agreed with the parents that under state law a felony charge alone would not justify an automatic suspension. However, the court concluded that the superintendent made the necessary finding that John's attendance at school "would have a substantial detrimental effect on the general welfare of the school." As a result, it concluded that the superintendent acted within his discretion in suspending John and upheld the school's decision.

***State v. Heirtzler*,** 789 A.2d 634 (N.H. 2001)

Joseph Heirtzler's science teacher observed him passing a folded piece of tin foil to a classmate at Londonderry High School (NH). The classmate took something from the foil and passed it back to Joseph. When class ended, the teacher contacted the school resource officer, Michael Bennette, who then passed the information on to Assistant Principal James O'Neil. Mr. O'Neil, along with another assistant principal, Robert Shaps, called Joseph to the office. They searched Joseph and found a piece of tin foil, which he admitted contained LSD. Mr. O'Neil then contacted Officer Bennette, who arrested Joseph. Joseph was subsequently charged with possession and distribution of a controlled substance. Joseph filed a motion to suppress the evidence obtained from the interrogation and search on the grounds that the evidence was obtained in violation of his search and seizure rights under both the state and federal constitutions. He contended that Mr. O'Neil and Mr. Shaps, the school officials who conducted the search, were required to have probable cause before conducting the search because they were acting as agents of the police. The New Hampshire Supreme Court upheld the trial court's suppression of the evidence because the school officials had acted as agents of the police. It declared that the government cannot circumvent the rights of a defendant by securing private parties to do what it cannot. Based on Officer Bennette's testimony that it was his job to report suspicious activity to school officials when he did not have legal grounds to take action himself, the Supreme Court found that a prior agreement existed between the [police] department and school officials that established an agency relationship.

***State v. McCooey*,** 802 A.2d 1216 (N.H. 2002)

John McCooey, a senior at Dover High School (NH), was convicted of disorderly conduct as a result of comments he made in class. John asked his English teacher, Marjorie Spaulding, for a hug and then said if he did not get a hug, he would or might shoot up the school. Although Ms. Spaulding believed John was

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being sarcastic, she reported the incident to a counselor who contacted the police. The New Hampshire Supreme Court overturned John's conviction because the state failed to prove that John's conduct caused a disruption. Neither students nor school staff were distracted or diverted from their classes or tasks by John's comments.

***DeCastro v. Wellston City School District Board of Education***, 761 N.E.2d 612 (Ohio 2002)

Mark DeCastro was involved in an altercation with a replacement teacher during a teachers' union's labor strike. As a result, he received a four-day suspension, which coincided with the last four days of his senior year. The suspension caused him to miss several activities involving graduating seniors. Mark filed suit against the school board, seeking money damages. He alleged breach of contract based on the agreement between the teachers' union and school board in which the board agreed not to retaliate against teachers, parents, and students who had been involved in the strike. Mark argued that his suspension constituted a breach of that agreement because he was a third party who was intended to benefit from the "no retaliation" provision. The Ohio Supreme Court ruled that Mark could not maintain a suit for breach of contract, even though the school board breached the contract by suspending him, because he failed to establish actual economic damages or even a theory for economic loss that would allow him to recover damages. The court concluded that while his four-day suspension may have deprived him of the enjoyment of participating in several graduation-related activities, that deprivation could not be measured or quantified in a tangible economic sense.

***In the Interest of R.H.***, 791 A.2d 331 (Pa. 2002)

After a classroom was vandalized, school police conducted an investigation. The evidence led them to R.H., a student at the school. A school police officer questioned R.H. about the event but did not give R.H. *Miranda* warnings prior to questioning him. During the questioning, R.H. admitted the break-in and vandalism. R.H. was subsequently charged with several criminal offenses in juvenile court. He filed a motion to keep the statements he made to the school police out of court. He claimed his Fifth Amendment rights were violated because the school police failed to issue him *Miranda* warnings prior to questioning him. The issue was whether school police officers should be considered "law enforcement officers" for purposes of the Fifth Amendment. The Pennsylvania Supreme Court concluded that school police officers are "law enforcement officers" who are required to issue *Miranda* warnings to individuals in their custody before questioning. It, therefore, ordered that all statements made by R.H. to the school police be suppressed.

## State Lower Court Opinions

***Cross County School District v. Spencer***, 58 S.W.3d 406 (Ark. App. 2001)

Hannah Spencer, an eighth grade student, was expelled from school for a year by the Cross County (AR) school board for violating a written school rule prohibiting threats against another student. Hannah had written a note in which she stated her intention to start a fight with a classmate during lunch. When the principal discovered the note, he suspended Hannah and recommended to the school board that she be expelled for the remainder of the school year. The board held a hearing and accepted the recommendation. Hannah's parents filed suit to have Hannah reinstated at school. A trial court ruled in favor of the parents and enjoined the school from enforcing the suspension. However, a state appellate court overturned the trial court's decision. It ruled that the trial court had improperly substituted its judgment for that of the school board. The appellate court found no abuse of discretion on the part of the school board because the rule prohibiting threats clearly covered situations such as Hannah's note.

***In re Johnny F.***, 2002 WL 397046 (Cal. App. 2002)

After a classroom at North Park High School in Los Angeles County (CA) was defaced with permanent markers on several occasions during a third period class, a campus security aide and a school counselor were sent to the classroom to investigate. They informed the third period students they were searching for markers. The students complied with the request to empty their pockets and backpacks. A lighter was found in Johnny F.'s possession in violation of school policy. Johnny F. also smelled like marijuana. He was escorted to the principal's office where marijuana was found in the pocket of his jacket. Johnny F. argued the search violated his Fourth Amendment rights. A California appellate court disagreed. The court rejected Johnny F.'s contention that school officials lacked reasonable suspicion to conduct the initial search in the classroom. Basing its reasoning on the U.S. Supreme Court case of *New Jersey v. T.L.O.*, it concluded that the search was justified from its inception and reasonably related in scope to the circumstances that prompted the search. Specifically, a teacher's report that the classroom was being defaced during third period justified the noninvasive search of having students empty their own pockets and backpacks. When the search yielded evidence that created a reasonable suspicion that Johnny F. had possession of drugs, the more intrusive search of his person became justified.

***Byars v. City of Waterbury***, 795 A.2d 630 (Conn. Super. 2001)

Several students and their parents filed an action challenging the City of Waterbury School District's (CT) dress code. The claims centered on the students' and parents' liberty and privacy interests. The court rejected both claims, concluding that the school district's interest in preventing disruptions in school caused by problems over clothing outweighed the students' right to wear their clothing of choice. Turning to the parents' claim, the court rejected the contention that parental autonomy is absolute. It stated that the parents' right is subject to reasonable restrictions within the school context. The court concluded that "[a]bsolute exercise of parental autonomy within the public school program would very likely cause total chaos as conflicting parental visions collided."

***M.S. v. State***, 808 So.2d 1263 (Fla. App. 2002)

School officials observed M.S. and three other students leaving school grounds during school hours. The officials intercepted the students and directed them back on campus. After they returned to school grounds, M.S. was detained while using a pay phone. One of the students eluded school officials by running into the administration building and disappearing. While searching the building, officials found marijuana in the bathroom. They then conducted a search of M.S. and found two bags of marijuana. M.S. was charged with possession of a controlled substance. He filed a motion to suppress the evidence found during the search on the ground that the search violated his Fourth Amendment rights. A Florida appellate court agreed with M.S. that the search was unconstitutional and ordered the evidence suppressed. It concluded that under the *T.L.O.* standard requiring that the search be justified at its inception, school officials lacked reasonable suspicion to search M.S based on the totality of the circumstances. The court found that while school officials may have had a reasonable suspicion to search the student who had eluded them based on finding drugs in the bathroom, that suspicion was not transferable to M.S. because he never entered the building.

***Chicago Tribune Company v. Board of Education of the City of Chicago***, 773 N.E.2d 674 (Ill. App. 2002)

Using the state freedom of information act (FOIA), the Chicago Tribune asked the Chicago Public Schools to provide information concerning approximately 1.1 million students. The newspaper wanted to know the students' medical status, guardian relationship, free or reduced lunch status, and standardized test scores. The school district refused to provide the information based on the burdensome nature of the request and the high risk of disclosure of personal information. In addition, the district argued that the state FOIA, the federal Family Educational Rights and Privacy Act (FERPA) and state student records laws protected the information from disclosure. The court agreed, saying the information was clearly the type of confidential information kept private by those laws.

***H.J. v. State***, 746 N.E.2d 400 (Ind. App. 2001)

H.J. and N.S., students at LaPorte High School (IN), compiled a "hit" list of people they allegedly intended to kill. When S.J., a classmate, learned that she and her brother were on the list, she reported it to the assistant principal and a police officer. When H.J. and N.S. learned that S.J. had spoken to school officials about the list, they told her, "We're gonna put a gun to your head" and "pull the trigger, and it'll only hurt for 30 seconds." A juvenile court found that H.J. had engaged in conduct equivalent to intimidation, a class

A misdemeanor. A state appellate court upheld the juvenile court's finding that H.J.'s actions constituted intimidation. It concluded that H.J.'s statement that she had a gun and intended to shoot S.J. satisfied the statutory definition of a threat. It also found that the retaliation requirement was satisfied because the facts established that H.J.'s threat was made in response to S.J. having informed school officials of the "hit" list.

***Lake Central School Corp. v. Scartozzi***, 759 N.E.2d 1185 (Ind. App. 2001)

Anthony Scartozzi, a middle school student at Lake Central (IN), was notified that the school was seeking his expulsion and the reasons for the expulsion. In addition, he was informed of his right to request a hearing. When he appeared at the hearing with an attorney, the hearing officer informed Anthony that his attorney was prohibited from participating in the hearing. However, the attorney was permitted to remain outside the hearing room for consultation with Anthony during the hearing. Following the hearing, the officer upheld the school's decision to expel Anthony. He subsequently filed suit against the school district, alleging that his right to due process under the state constitution had been violated when his attorney was barred from participating in the expulsion hearing. A state appellate court ruled that due process under the state constitution did not require that a student's attorney be permitted to fully participate in the student's disciplinary hearing. Finding that the state constitution's due process provision and the federal due process clause were analogous, the court applied a three-factor test to determine the constitutionality of Lake Central's policy of barring attorneys from participating in disciplinary hearings. Applying the first factor, it found that the cost of allowing students to be represented by attorneys in hearings would force school districts, whose financial resources are already stretched thin, to pay legal counsel for representation at hearings. As a result, the court concluded that student discipline would end up in the hands of lawyers instead of educators where the process belongs. Regarding the second and third factors, i.e., the risk of error if the procedure is withheld and the consequences of error to the student requesting the procedure, it found the risk of error and the consequences of such error acceptable in light of the fact that students facing a disciplinary hearing could have an attorney available for consultation and in addition retained the right to appeal a hearing officer's decision.

***Penn-Harris-Madison School Corp. v. Joy***, 768 N.E.2d 940 (Ind. App. 2002)

The Indiana Court of Appeals ruled that Penn-Harris-Madison School Corporation's random suspicionless drug and alcohol testing policy for students participating in extracurricular activities and driving to and from school is valid under the state constitution. It invalidated that portion of the policy that required student drivers to submit to nicotine testing. The court concluded that the school corporation lacked a sufficient interest in preventing nicotine use by student drivers to justify the intrusion on students' liberty interests.

***State v. Gibbs***, 769 N.E.2d 594 (Ind. App. 2002)

After receiving a phone tip that Andrew Gibbs, a student at Connersville Senior High School (IN), had a handgun in his vehicle, the principal had the school security officer question Andrew and search his car. The gun turned out to be inoperable. Andrew was charged with carrying a weapon without a license on school property. The trial court dismissed the charges on the ground that an inoperable handgun could not be considered a firearm. The Indiana Court of Appeals disagreed and reinstated the charges. It ruled that the handgun's inoperable condition was irrelevant because the gun was designed to fire bullets. The sight of it would provoke a fearful response from the average person who would be unlikely to wait to ascertain if the gun was operable before reacting with panic or violence.

***State ex rel. Rockwood R-VI School District***, 63 S.W.3d 682 (Mo. App. 2001)

Kevin Cordia, a student in the Rockwood (MO) school district, was charged with violating school district policy by bringing a weapon to school. After the school board held a hearing, it voted to expel him. Kevin filed suit, seeking to overturn the board's decision. A state trial court issued an order staying Kevin's expulsion and remanding the case to the board for a rehearing. A state appellate court reversed the trial court. It issued an order affirming the board's decision to expel Kevin and prohibiting the trial court from remanding the case to the board for rehearing. The appellate court ruled that the trial court "lacked the power to act as intended" because it had made no specific finding: (1) that there was evidence that could not have been produced in the exercise of due diligence at the hearing; or, (2) that there was evidence improperly excluded at the hearing.

***State v. Mortimer,*** 542 S.E.2d 330 (N.C. App. 2001)

In the wake of the shootings at Columbine High School, Joshua Mortimer, a student at Hoggard High School (NC), was arrested by the police after he placed a screen saver on a computer in a keyboarding class that stated, "the end is near." Joshua admitted he was responsible for the screen saver, but he stated that it merely meant that the end of the school year was near. The detective who arrested Joshua testified that he knew it was a prank. However, the jury found him guilty of the criminal offense of communicating a threat. A state court of appeals overturned Joshua's conviction, concluding that his actions did not constitute a threat to injure a person or property as required by the law to sustain a conviction for communicating a threat. The court found that the meaning of the statement "the end is near" was impossible to ascertain, and, further, that Joshua's conduct was not connected with any threats to commit acts of violence.

***Joye v. Hunterdon Central Regional High School Board of Education,*** 803 A.2d 706 (N.J. Super. 2002)

Hunterdon Central Regional High School (NJ) implemented a policy that requires all students participating in extracurricular activities or seeking parking privileges on school grounds to consent to suspicionless, random drug testing. Several students sued, challenging the policy on Fourth Amendment and state constitutional grounds. The New Jersey Superior Court, Appellate Division, ruled that the drug testing policy is constitutional under both the federal and state constitutions. The federal question was settled by the U.S. Supreme Court's decision in *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 2559 (2002). The court found there was no basis "for concluding that the State Constitution warrants a different approach than that taken by the [U.S.] Supreme Court [regarding] the question of [student] drug testing in public schools under the Fourth Amendment."

***State v. Crystal B.***, 24 P.3d 771 (N.M. App. 2000)

After an assistant principal received information that Crystal B. and some other students were smoking off-campus before the school day had begun, he found them off-campus and ordered them to return to campus in his car. He then escorted the students to his office where he conducted a search of each student. He found a small amount of marijuana in Crystal's book bag. As a result, she was charged with possession of marijuana. Crystal claimed that both her seizure off-campus and the assistant principal's subsequent search of her book bag violated her Fourth Amendment rights. A state appellate court ruled that the assistant principal's action in pursuing and detaining Crystal off-campus was an illegal seizure because he had no authority under New Mexico law to enforce school rules off-campus. Because his seizure was unjustified, the court also found that the search of her bag was tainted. As a result, it concluded that the search of her bag violated the Fourth Amendment, and the drugs found could not be used to charge her with possession of a controlled substance.

***People v. Butler,*** 725 N.Y.S.2d 534 (Sup. Ct. 2001)

School safety officers Glenn Coyle and Sgt. Thompson questioned Jameel Butler in the hallway of Sheepshead Bay High School (NY) after they noticed that he was wearing bandanas with gang colors. When Jameel was unable to produce anything identifying him as a student, the officers asked him to accompany them to the dean's office. At the office, Jameel claimed to be a transfer student from Madison High School and produced a student program card that identified him as Kenmar Butler. However, the officers quickly discovered that he was not Kenmar. At that point, Officer Coyle searched Jameel's person and found a handgun. He also discovered a picture I.D. that identified Jameel as a student at Madison. Jameel was then questioned by the officers and Dean Finley regarding whether the gun was loaded, how he entered the building, and where he obtained the gun. At no time was Jameel given *Miranda* warnings. He was then charged with illegal possession of a firearm. Jameel's attorney argued that the search conducted by the officers violated the Fourth Amendment because the officers lacked probable cause to conduct the search. A state court ruled that the search was constitutional, even in the absence of probable cause, because the more stringent probable cause standard was not applicable to a search that takes place within a school environment. The court reasoned that the school's interest in maintaining discipline and ensuring the safety of students outweighed the student's search and seizure rights. As a result, it concluded the officers had acted appropriately in conducting the search because they had reasonable grounds for believing the search would turn up evidence that Jameel violated school rules.

***T.S. v. Penn Manor School District*,** 798 A.2d 837 (Pa. Commw. 2002)

T.S., a student at Penn Manor High School (PA), purchased what he believed was a packet of marijuana. When he discovered it was not marijuana, T.S. threw the packet away. However, school officials learned that T.S. had purchased what he believed was drugs. During questioning by school officials, T.S. admitted to the purchase. Based on the school committee's recommendation, the school district expelled him for the remainder of the school year for violating the district's policy prohibiting the use, transfer or disposition of "drug look-a-likes." A Pennsylvania appellate court upheld the expulsion on two grounds. First, it upheld the trial court's denial of T.S.'s request to examine other students' disciplinary records since that would require the district to release confidential information. Second, it found T.S.'s argument that he was not properly notified of the school district's "drug look-a-likes" policy without merit because the policy was properly adopted and a copy of it was generally available in the school library.

***In the Matter of D.A.R.*,** 73 S.W.3d 505 (Tex. App. 2002)

A school resource officer notified the assistant principal that a student had told him D.A.R. had a weapon. The assistant principal called D.A.R. to his office where he did a cursory search and found no weapon. Later that day the resource office called D.A.R. to his office and questioned him. During questioning, D.A.R told the resource officer where the gun was located. The gun was found in that location. D.A.R. was then given *Miranda* warnings and arrested. The Texas appellate court ruled that D.A.R.'s statements to the resource officer gun were inadmissible in the juvenile proceeding because of the failure to give *Miranda* warnings. The court concluded that given the totality of the circumstances surrounding Officer Gonzalez's questioning of D.A.R., i.e., he was taken to the office by a uniformed security guard, he was unaccompanied when questioned, he was not told he could have a parent or other adult present, and he was not told he could leave, established that a reasonable 13 year-old would have believed he was in custody. The court concluded that the resource officer's questioning of D.A.R. in the absence of *Miranda* warnings violated his Fifth Amendment and state law rights against compelled self-incrimination.

***In the Matter of V.P.*,** 55 S.W.3d 25 (Tex. App. 2001)

V.P., a student attending middle school in the Austin Independent School District (TX), hid a gun in a friend's backpack during the bus ride to school. When they arrived at school, V.P. retrieved the gun and asked another student, M.M., to hold it for him. The first student informed school district police officer Lance Cox that V.P. had a gun. V.P. allowed Officer Cox to conduct a search of his person. Officer Cox and Ira Williams, the school's hall monitor, escorted V.P. from class to Assistant Principal Vince Trevino's office. Officer Cox left the office during the questioning by Mr. Trevino to search for the gun elsewhere. V.P. eventually confessed to Mr. Trevino that he had brought a gun to school and that it was in M.M.'s possession. The gun was retrieved from M.M. V.P. was charged with bringing a weapon to school and adjudicated delinquent in juvenile court. On appeal he sought to suppress his confession and the gun on the ground that Mr. Trevino's questioning was custodial in nature and, therefore, his right against self-incrimination was violated when Mr. Trevino continued to question him after he asked to speak to a lawyer. A state appellate court upheld V.P's conviction. It concluded that Mr. Trevino was acting as a school official, not an agent of law enforcement, because his primary interest was the safety of the students and faculty. As a result, the appellate court concluded that V.P. had no right against self-incrimination because he was not in police custody at the time Mr. Trevino questioned him.

***Russell v. State***, 74 S.W.3d 887 (Tex. App. 2002)

Michael Russell, a high school student, and two classmates were sent to the principal's office after they were observed smoking in the school parking lot. The principal noticed that Michael was clutching one of his pants pockets. Believing that he might be concealing a weapon, she directed him to empty his pockets. When Michael refused, she asked Gregory Lee, a police officer assigned to the school, to search him. Officer Lee found a bag of marijuana in Michael's pocket. In the subsequent criminal case, Michael claimed the search violated the Fourth Amendment. The Texas Court of Appeals disagreed. It ruled that Officer Lee's search did not violate the Fourth Amendment's proscriptions of unreasonable searches because the officer, acting on his own initiative as a school resource officer, had reasonable suspicion to conduct the search based on the facts and circumstances of the situation.

***York v. Wahkiakum School District No. 200***, 40 P.3d 1198 (Wash. App. 2002)

Wahkiakum School District (WA) adopted a policy requiring random drug testing of all students who participate in interscholastic athletics. A group of parents filed suit in state court, asking that the policy be enjoined because it violated students' Fourth Amendment rights. The state appellate court relying on *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), upheld the policy. The court pointed out that "suspicionless searches are not unreasonable per se" and could be upheld in "special needs" circumstances.

# LIABILITY

## Supreme Court Opinions

***Lapides v. Board of Regents of the Univ. Sys. of Georgia***, 122 S. Ct. 1640 (2002)
http://supct.law.cornell.edu/supct/html/01-298.ZS.html

**Issue:** Whether a state waives its Eleventh Amendment immunity when it removes a case from state court to federal court.

**Facts:** A professor in the Georgia State University system filed a suit in court against the Board of Regents and university officials, alleging that they had violated state tort law and his federal privacy rights by placing sexual harassment allegations in his personnel file. The university removed the case to federal district court and sought dismissal. The university claimed that although state law waived Georgia's sovereign immunity from state lawsuits in state court, it was entitled to Eleventh Amendment immunity in federal court. The district court held that Georgia had waived its immunity by moving the case to federal court. The Eleventh Circuit Court of Appeals reversed, finding that because state law was unclear as to whether the state attorney general had the legal authority to waive Georgia's immunity, the State retained the legal right to assert immunity, even after removal.

**Holding:** The Supreme Court reversed the Eleventh Circuit decision, holding that a state waives its Eleventh Amendment immunity when it removes a case from state court to federal court. The Court held that as an established principle, a state's voluntary appearance in federal court amounts to a waiver of its Eleventh Amendment immunity. Here, Georgia although brought involuntarily into the suit, did voluntarily remove the case to federal court, thus invoking that court's jurisdiction.

## Circuit Court Opinions

***Doe v. City of Roseville***, 296 F.3d 431 (6th Cir. 2002)

John Lomnicki taught at several elementary schools in Roseville Community School District (MI) from 1960 to 1995. As a result of several accusations of inappropriate physical touching, he received verbal warnings and a written reprimand. At least one of the incidents was reported to the superintendent and the assistant superintendent. In 1992, he sexually molested a student, but the student did not report the misconduct until two years later. The student sued the school district and several school officials. She claimed that the defendants had violated her constitutional right to be free from sexual abuse at the hands of a school official or teacher because they failed to take appropriate action in response to reports of Mr. Lomnicki's alleged abuse of children. The U.S. Court of Appeals for the Sixth Circuit concluded that the school district administrators had responded in a negligent, sloppy, and reckless manner to reports of Mr. Lomnicki's misconduct, but there was not such a widespread pattern of constitutional violations that their actions or inactions amounted to deliberate indifference. Thus, it found no district liability.

***Martin v. Shawano-Gresham School District***, 295 F.3d 701 (7th Cir. 2002)

Timijane Martin, a student at Shawano Community Middle School (WI), was suspended from school for three days after the assistant principal found cigarettes in her locker. Timijane became distraught about the suspension but declined the assistant principal's offer to contact either of her parents at work. Instead, Timijane rode the bus home where she committed suicide. Her parents sued the school district and several school district officials for violating Timijane's substantive due process rights. The Seventh Circuit Court of Appeals rejected these claims. The substantive due process claim was found without merit since the school did not create or increase the risk that Timijane would commit suicide and had no affirmative duty to protect her after school hours. The school officials' "alleged knowledge of her fragile emotional state is irrelevant for purposes of the due process clause."

***S.J. v. Kansas City, Missouri Public School District*,** 294 F.3d 1025 (8th Cir. 2002)

S.J., a female student at Martin Luther King Middle School (MO), met Gregory Robertson, a school volunteer. Subsequently S.J.'s mother arranged for S.J. to live with Mr. Robertson's family. Mr. Robertson was later convicted of sexually abusing her while she was at his home. She sued the school district under Section 1983, a federal law allowing damages for violations of constitutional rights. The Eighth Circuit Court of Appeals ruled that S.J. could not use Section 1983 to sue the school district for the volunteer's misconduct. To support her claim, S.J. would have to show that Mr. Robertson was acting "under color of state law" when he sexually abused her. Because his criminal assault on S.J. "occurred in his own home and in circumstances unrelated to his role as a school volunteer," the court concluded that the abuse could not be attributed to the school. The court also rejected S.J.'s claim that the school district customarily failed to receive, investigate and act upon complaints of employee sexual misconduct. Lastly, the court rejected S.J.'s claim of failure to properly train volunteers. Absent a pattern of misconduct, there was no "patently obvious" need for the school district to train volunteers not to commit felonies at home and in their private lives.

***Harris v. Robinson*,** 273 F.3d 927 (10th Cir. 2001)

Ricky Harris, a moderately mentally challenged elementary school student, was instructed by his homeroom teacher, Vicki Robinson, to remove soiled toilet paper from a toilet with his bare hands, after he admitted stopping up the toilet. After learning about the incident, Rickey's parents met with Ms. Robinson, the principal and the superintendent. Ms. Robinson apologized for her actions and received a written reprimand. However, the superintendent rejected the parents' demand that she either resign or be terminated. They removed Ricky from school and began home schooling him. The parents filed suit against Ms. Robinson and the school district. A federal appellate court ruled that Ms. Robinson's actions had not violated Ricky's Fourteenth Amendment due process rights, and that in any event, she was entitled qualified immunity because it was not clearly established law that her actions violated Ricky's statutory or constitutional rights at the time of the incident. The court pointed out that although Ms. Robinson had exercised poor judgment and was careless, her actions were neither inspired by malice or sadism, nor were they excessively cruel, subjecting Ricky to appreciable pain. As a result, it concluded that Ms. Robinson's actions were not deliberate and malicious conscience-shocking conduct that constituted a violation of Ricky's Fourteenth Amendment substantive due process rights. Regarding the claim against the school district, the court found that there was no evidence that Ms. Robinson's actions were consistent with district policy and custom.

## Federal District Court Opinions

***Doe v. Benicia Unified School District*,** 206 F. Supp. 2d 1048 (E.D. Cal. 2002)

Jane Doe, an elementary school student, met Carlos Aparicio, a school custodian, when she helped him clean up after a school ice cream social in December 1998. Jane began returning to school after hours to help Mr. Aparicio. When the principal became aware of the situation, she instructed Jane to leave and admonished Mr. Aparicio for allowing a child to help him with his work. He assured the principal that it would not happen again. However, in February 1999 he phoned Jane's home on at least two occasions. After Jane's father reported the calls to the principal, she in turn reported the incidents to the maintenance director. After the director met with Mr. Aparicio and his union representative, the phone calls ceased. Mr. Aparicio sexually molested Jane on school grounds in June 1999. Jane filed suit in federal district court under Section 1983 against the school district and various school officials. She claimed that the defendants were liable based on their supervisory authority. The federal district court dismissed the claim. It found that neither Jane's assisting Mr. Aparicio with his maintenance duties nor the phone calls could be considered "sexual behavior." In addition, while the court conceded, "hindsight lends an increased and ominous significance to these prior incidents," it concluded that the facts as presented did not establish a pattern that clearly indicated sexual abuse.

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***Schultzen v. Woodbury Central Community School District*****,** 187 F. Supp. 2d 1099 (N.D. Iowa 2002)

April Schulten, a student athlete at Woodbury Central Community High School (IA), was observed smoking a cigarette in violation of the school district's "good conduct code." As a result, Principal Wisniewski suspended her from all extracurricular activities for 12 weeks. April filed suit under Title IX and Section 1983, alleging gender discrimination based on the fact that similarly situated male students were treated substantially differently for the same violation of school rules. The school district moved to dismiss her claim for punitive damages. A federal district court agreed with Woodbury Central School District, finding that school districts are immune from punitive damages under Section 1983. Turning to the Title IX claim, the court conceded that Title IX supported the award of punitive damages. However, the court found that in crafting Title IX, Congress did not expressly eviscerate the well-established immunity of municipal corporations from punitive damages. In addition, it concluded that the public policy of deterring discrimination in educational institutions did not compel a different result, since any punitive damages would be shouldered by the taxpayers and would not punish the individual district officials who allegedly violated Title IX, nor deter them from committing future violations.

***Arum v. Miller*****,** 193 F. Supp. 2d 572 (E.D.N.Y. 2002)

Carole Arum met with Richard Miller, Director of Pupil Services for the Syosset School District (NY), in January 2000 to discuss a bus safety issue involving her disabled son. During the meeting, Ms. Arum asked to view her son's education file. Ms. Arum alleged that while she was reviewing the file, Mr. Miller suddenly pulled it away from her and struck her in the mouth with his elbow. Both Ms. Arum and Mr. Miller called the police. When the police arrived, Mr. Miller told them he asked Ms. Arum to leave, and she refused. The police arrested her on charges of assault and trespass. A grand jury later dismissed the assault charge, and later still the district attorney dismissed the trespass charge. Ms. Arum filed suit in federal district court against Mr. Miller, the school board, the school district, individual police officers involved in her arrest, and the police department. Ms. Arum brought several federal claims under Section 1983, including malicious prosecution, and excessive force. The court dismissed the state law claims against all the defendants on the ground that they were frivolous. It also dismissed all the federal claims against Mr. Miller, the school board, and the school district with the exception of the malicious prosecution and excessive force claims. The court found that the school board and school district could not be held liable because Ms. Arum failed to allege that the board or district had a policy, custom, pattern or practice of excessive force or malicious prosecution. However, the court ruled that Ms. Arum had valid claims against Mr. Miller under Section 1983. It rejected his argument that he was entitled to qualified immunity, since it could not state as a matter of law that it was objectively reasonable for Mr. Miller to believe that making a false accusation of trespass and striking Ms. Arum with his elbow did not violate the law.

***Nordo v. School District of Philadelphia*****,** 172 F. Supp. 2d 600 (E.D. Pa. 2001)

Ashley Schoener, a mentally disabled student, was harassed and assaulted in the schoolyard by a group of students as she was leaving school. Theresa Nordo, who was picking up her son Joseph, witnessed the assault. Mrs. Nordo told Joseph to help Ashley. When he intervened, the students assaulted him. Following the incident, both mothers met with the principal. At his suggestion, they began picking up their children in a different area of the school away from the playground where the incident occurred. Both Ashley and Joseph were involved in later incidents. In Ashley's case, she bruised her eye during recess when she stopped to tie her shoe and another student bumped into her. Joseph was involved in a water-spitting incident during which another student punched him. None of the children involved in the later incidents were part of the group that assaulted Ashley. Both Ashley's and Joseph's parents requested they be transferred. However, neither student's parents completed the paperwork required for transfers. Both families filed suit against the Philadelphia school district. They claimed that Ashley's and Joseph's substantive due process rights were violated because the school failed to protect them from other abusive students. The federal district court dismissed the claims against the school district. The court found the later incidents were neither related nor foreseeable. The school district's actions did not place Ashley and Joseph in a position of danger. Finally, the court found no liability for failing to transfer the students to a different school since the parents failed to complete the necessary paperwork to permit the district to transfer them.

## State Supreme Court Opinions

***Pauley v. Anchorage School District***, 31 P.3d 1284 (Alaska 2001)

When James and Teri Pauley divorced, they agreed to joint legal custody of their son Michael with James retaining primary physical custody. Under this arrangement, Teri Pauley had visitation with Michael during the summer and Christmas vacations. James was concerned that Teri might attempt to abduct Michael and contacted the principal, James Graham. Mr. Graham requested and received a copy of the custody order. Three days before Christmas vacation was scheduled to start, Teri Pauley arrived at Michael's school accompanied by a local police officer. After a discussion with Teri and the police officer, Mr. Graham called James advising him of the situation. He then allowed Michael to leave with Teri. Teri refused to return Michael to James following Christmas vacation, alleging that James had mistreated their son. James eventually obtained a court order directing Teri to return Michael. James Pauley filed suit against the school district, contending that Mr. Graham's actions were negligent and constituted intentional interference with James's custodial rights. The state supreme court ruled that the school district was immune from James's suit under a state law granting immunity from lawsuits to municipalities and municipal employees when the suit is based on actions that are discretionary in nature. The court found Mr. Graham's decision to release Michael to his mother was clearly discretionary because he acted with deliberate and considered judgment.

***Barrett v. Unified School District No. 259***, 32 P.3d 1156 (Kan. 2001)

Robert Barrett was a student at Southeast High School (KS). During football conditioning drills, Robert informed Assistant Coach Al Hobson that he was not feeling well. Coach Hobson instructed Robert to take a water break. Assistant Coach Fluty instructed Robert to sit out the drill and drink water. When the conditioning drills concluded, the team began leaving the field, at which point Robert collapsed and later died at a local hospital. Robert's mother, Frances Barrett, filed suit against the school district, alleging negligent supervision. The school district argued that it was immune from the suit because under state law a governmental entity is not liable for any claim resulting from use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes unless the governmental entity or employee is guilty of gross and wanton negligence. The Kansas Supreme Court held that the school district and the coaches named in the suit were entitled to immunity. The court concluded that the "granting of immunity for activity at a public recreational facility that would be actionable if it occurred at a private recreational facility reasonably advances the legitimate statutory goal of encouraging the development of public recreational facilities."

***Berry v. Orleans Parish School Board***, 2002 WL 1354227 (La. 2002)

The Orleans Parish School Board (LA) contracted with the Lighthouse of the Blind to provide mobility-training services to school district students. Under the contract, Lighthouse agreed to indemnify the school district for all legal claims arising out of misconduct or negligence on the part of Lighthouse or its employees. During the term of the contract, a Lighthouse employee allegedly sexually molested two students. The parents of the students filed separate negligence suits against Lighthouse and the school district. The school district invoked the indemnity provision. The Louisiana Supreme Court agreed with the school district, ruling that the indemnity provision required Lighthouse to defend and indemnify the school district for any independent acts of negligence that arose out of misconduct or negligence by Lighthouse or its employees.

***Sharon v. City of Newton***, 769 N.E.2d 738 (Mass. 2002)

Merav Sharon, a student at Newton North High School (MA), was a member of the cheerleading squad. She suffered a serious arm injury during practice. She filed a negligence action against the city district. The city sought to dismiss the suit since Merav's father signed a waiver releasing the city from liability for any injury suffered from participation in the athletic program. The Massachusetts Supreme Court dismissed Merav's suit, ruling that the release was valid. The court concluded "Merav's father had the authority to bind his minor child to an exculpatory release that was a proper condition of her voluntary participation in extracurricular sports activities offered by the city." The court found that the release was clearly written and labeled so that there was no ambiguity that the waiver of liability was a condition of participation. The court concluded that enforcement of the release would not violate public policy. On the contrary, it found that Massachusetts favors enforcement of releases as consistent with the state's policy of encouraging athletic programs.

***Miller v. Monogalia County Board of Education***, 556 S.E.2d 427 (W.Va. 2001)

During the 1989-90 school year, Donald McIntosh, a teacher at South Junior High School (WV), repeatedly sexually abused one of his students, Erika Miller. Ms. Miller, who was fourteen at the time of the abuse, did not report it until almost ten years later. Mr. McIntosh was subsequently convicted of sexual assault. During Mr. McIntosh's criminal trial, Ms. Miller discovered facts that indicated that the school district was aware of his pedophilic tendencies at the time she was being abused. As a result, she filed suit against the Monogalia County Board of Education, alleging that it was liable for fraudulently concealing the information and failing to prevent him from sexually abusing students. The board contended that Ms. Miller's suit was barred because she failed to file suit within two years after turning eighteen. The state supreme court rejected the board's argument and ruled that Ms. Miller's suit was not barred because the two-year limit had expired. While it agreed that the clock on her suit would have begun running when she turned eighteen if she had been aware of the board's misconduct, the court pointed out that her allegations demonstrated that the board had acted to fraudulently conceal its knowledge. The court concluded that when a wrongdoer evades detection by means of fraudulent concealment, the statutory limitation does not begin running until the injured party knows, or by exercising reasonable diligence should know, that the wrongdoer's actions have resulted in an injury.

## State Lower Court Opinions

***Kahn v. East Side Union High School District***, 117 Cal. Rptr. 2d 356 (App. 2002)

Olivia Kahn, a freshman, joined the girls' swim team. She informed Coach McKay that she had never swam competitively and that she was afraid of diving off the starting blocks. Coach McKay indicated to Olivia that he would assign her to the first leg of relays, allowing her to start from inside the pool rather than diving off the blocks. Into the season, during a meet in their home pool, Coach McKay informed Olivia that she would not be swimming the first leg of the relay. When Olivia told him that she was afraid to dive off the blocks into the shallow end, Coach McKay responded, "either dive in off the blocks or you are not swimming." While practicing diving off the blocks, Olivia broke her neck on her third practice dive. Her parents filed suit against Coach McKay and East Side Union High School District for negligence. The court ruled in favor of the coach and the school. It held that Olivia's injury resulted from risks inherent in competitive swimming. It rejected the contention that Coach McKay pushed her beyond her skill level. It concluded that nothing in his conduct was intentionally harmful or reckless. The court also rejected Olivia's argument the coach had increased the risk by challenging her, since she did not have to accept that challenge.

***DeKalb County School District v. Allen***, 561 S.E.2d 202 (Ga. App. 2002)

Shaniecia Allen, a seven-year-old child, attended public school in DeKalb County School District (GA). Shaniecia's mother, Wendy Allen, drove her to the front of the apartment complex where they lived to wait for the bus. When a bus arrived and pulled up behind Ms Allen's car, Shaniecia exited the car and walked toward the bus. Ms. Allen recalled seeing the bus doors open, but did not actually see Shaniecia board the bus. Ms. Allen pulled out onto the road to make a U-turn to return to the complex. As she headed back she saw that the bus was still at the front of the complex and saw that the bus number was different from her daughter's bus. She then saw Shaniecia who ran into the road and was struck and killed by another car. Ms. Allen filed a wrongful death suit against DeKalb County School District. A Georgia Court of Appeals rejected the school district's sovereign immunity defense. It found that but for the presence of the bus, Shaniecia would not have left the safety of her mother's car, and the accident would not have occurred.

***Vaughn v. Orleans Parish School Board***, 802 So.2d 967 (La. App. 2001), *appeal denied*, 818 S.2d 773 (La. 2002)

John Vaughn, a second grade student at Lafayette Elementary School (LA), was sexually assaulted by two classmates in his classroom while their teacher, Vivian Thompson, was present. Ms. Thompson was allowing the students to work independently when the assault occurred. She was sitting at her desk monitoring the noise level in the classroom when she noticed activity at the table where John and his assailants were seated. When Ms. Thompson approached the table, she was told that John had been forced to perform a sexual act on another student. John filed suit against the school board, alleging that Ms. Thompson's negligent supervision of her class resulted in John being assaulted. A state appellate court ruled that the school board was liable for Ms. Thompson's negligent supervision of the students in her classroom. It rejected the board's contention that John had failed to prove what specific conduct on the teacher's part constituted a negligent failure to supervise. The court, instead, found that the fact that the threats and the assault had occurred in her classroom, and that she had ample opportunity to notice and prevent the assault, demonstrated a failure to reasonably supervise her class.

***Fear v. Independent School District 911***, 634 N.W.2d 204 (Minn. App. 2001), *appeal denied*, 5 No. 52 Minn. Lawyer 9 (2001)

Nicci Fear, a student at Cambridge Elementary School (MN), was injured during recess when he fell from a snow pile onto a piece of ice. The snow had been placed on the playground by the snow removal contractor at the direction of the school district. School staff supervising the students did not instruct them to stay off the snow pile. Nicci filed a negligence suit against the school district, the snow removal contractor, and various school district employees. A Minnesota appellate court ruled that under state law, the school district was not entitled to statutory immunity. The court concluded that the school district had not provided adequate proof that its decision to place the snow on the playground was a planning-level decision entitled to statutory immunity. It found that the school district had failed to establish that there was a definite policy decision made regarding snow placement.

***Gutierrez v. West Las Vegas School District***, 48 P.3d 761 (N.M. App. 2002)

Sam Gutierrez, a member of the West Las Vegas Middle School band, was injured at a multi-school band event at Albuquerque High School (AHS) sponsored by the University of New Mexico (UNM). The injury occurred after the band director had left the AHS auditorium to attend to other duties. He had asked the parent-chaperons to supervise the students, but the chaperons were denied entry to the auditorium. As a result of horseplay by other band members, Sam was struck in the eye by a music stand. Sam's mother sued the school district, AHS, and UNM for negligent failure to supervise the students. The New Mexico Court of Appeals dismissed Mrs. Gutierrez's claim because under state law, the school district was immune from being sued. Since the band event did not take place on school district property, the state law provision waiving the district's immunity did not apply. The court rejected her argument that the band event was a joint operation with AHS and UNM.

***Gonzalez v. City of New York***, 730 N.Y.S.2d 154 (App. Div. 2001)

Lorenzo Gonzalez, a seventh grade student, was injured while running in the hall at school. A teacher monitoring the hall between classes observed Lorenzo running and told him to stop. When Lorenzo kept running, the teacher stuck out his leg and tripped Lorenzo. Lorenzo filed suit against the school district. A state appellate court ruled that the teacher's actions constituted negligent supervision because the school owed the same standard of care that a parent of ordinary prudence would exercise under similar circumstances. The court concluded that a parent of ordinary prudence would not try to prevent a child from running by tripping the child as he ran past.

***Jimenez v. City of New York***, 738 N.Y.S.2d 380 (App. Div. 2002)

After a fight erupted, Juan Jimenez was shot while trying to leave a dance held in a high school cafeteria. Juan filed suit against the New York City school system, alleging negligence based on inadequate supervision. A state appellate court ruled that the school was not liable for Juan's injuries because it had not made an affirmative promise of protection to him which gave rise to any special duty. The court stated that Juan failed to "set forth a claim of inadequate supervision since it was not reasonably foreseeable that a shooting would occur."

***Lurene F. v. Olsson,*** 740 N.Y.S.2d 797 (Sup. Ct. 2002)

Michael F. attended a public high school in New York. During the summer of 1999, he had a sexual encounter with Kenneth Olsson, an adult, while participating in a theater program. In November 1999, Michael told his music teacher, Andrew Beck, about the encounter. However, Mr. Beck did not report the abuse as required by state law. When Michael's mother found out about the sexual incident, she filed an action against Mr. Olsson and the school district. In addition to Michael's claim against Mr. Olsson, the suit sought damages for both Michael and his mother based on Mr. Beck's failure to report the abuse. The trial court dismissed Mrs. F.'s claim against the school district on the ground that the district's breach of its statutory duty to report known or suspected child abuse did not create a cause of action for anyone other than the abused child.

***Nossoughi v. Ramapo Central School District,*** 731 N.Y.S.2d 78 (App. Div. 2001)

Joshua Nossoughi, a high school student, was assaulted in the entrance hallway of the school approximately two hours after regular school hours. The assailant was a former student trespassing in the building. Joshua filed suit, claiming the school district had negligently failed to provide adequate supervision. A New York state appellate court ruled that the school district was not liable for Joshua's injuries because the attack on him was not foreseeable. The court noted that the school district's duty to protect against assaults by third parties could only be created if there was a foreseeable risk of such assaults. It concluded that the district had no duty because there had been no prior incidents of a similar nature that would have put the district on notice. In addition, the court found that the district's alleged negligence was not the proximate cause of Joshua's injuries because the intervening criminal attack by the assailant was an intervening and unforeseeable act that broke any causal connection between the school district's alleged negligence and Joshua's injuries.

***Remigio v. City of New York,*** 737 N.Y.S.2d 364 (App. Div. 2002)

Jacinto Remigio, a minor child, sustained injuries when he fell off a jungle gym on a New York City public school playground. His parents filed a negligence suit against the City of New York, including the New York City School Construction Authority (NYCSCA). The NYCSCA moved to be dismissed from the lawsuit since it did not construct, design, or maintain the jungle gym or supervise the playground. The state appellate court agreed and dismissed NYCSCA from the action, finding that NYCSCA's sole connection to the playground equipment began and ended with installation.

***Sinto v. City of Long Beach,*** 736 N.Y.S.2d 700 (App. Div. 2002)

Gregory Sinto suffered injuries while playing on a swing located on the playground at East School. His parents filed a negligence suit against the City of Long Beach School District (NY). They argued that the school district had notice that the swing was defective. A state appellate court dismissed the suit. In the head custodian's deposition, he testified that he inspected the playground on a daily basis and was not aware of any accidents on or defects in the swings. As a result, the court concluded that the school district did not have constructive notice that the swing was defective. The court also concluded that the doctrine of *res ipsa loquitur, i.e.,* that the circumstances of the accident alone created an inference of negligence, was not applicable in this case because the school district did not have exclusive control over the swing. The general public enjoyed unrestricted access to all the swings on the playground; the school district could not have had exclusive control over the swing Gregory was playing on when he was injured.

***Watkins Glen Central School District v. National Union Fire Insurance Co. of Pittsburgh***, 732 N.Y.S.2d 70 (App. Div. 2001)

At the time Watkins Glen Central School District (NY) hired Gary Sero as a teacher in 1984, it was unaware that he had been convicted of child sexual abuse in 1974 while teaching elementary school in Pennsylvania. Despite a lengthy gap in his teaching employment history, the school district did not discover Mr. Sero's conviction until he was accused of sexually abusing several male students at the middle school. The students filed suit against the school district for negligent hiring, supervision, and retention of Mr. Sero. Watkins Glen requested that National Union Fire Insurance Co. provide legal defense and indemnification under its errors and omissions liability policy. National Union denied coverage under the policy's exclusion for intentional acts, i.e., sexual assault. A state appellate court ruled that National Union was obligated to provide the school district with legal defense and indemnification because the basis of the students' suit against Watkins Glen was negligent hiring and supervision, not the intentional acts of Mr. Sero.

***Wenger v. Goodell***, 733 N.Y.S.2d 523 (App. Div. 2001)

On March 8, 1991, Steve Wegner, a student at Canastota Junior-Senior High School (NY), accepted a ride home from another student, Scott Goodell, rather than taking the school bus. Scott was involved in an accident that resulted in Steve being injured. Walter Wegner, Steve's father, filed suit against the school district. Mr. Wegner claimed that the school district had assumed a special duty to ensure his son, Steve, was transported to and from school only by the school bus. He based this claim on conversations he had with the school guidance counselor, Louanne Prince, and school board president, Ken Starrs. Mr. Wegner asserted that both Ms. Prince and Mr. Starrs acknowledged that the school had a duty to transport his son safely to and from school. A state appellate court ruled that the school district could not be held liable for Steve's injuries because the conversation Mr. Wegner had with school district officials did not create a special duty on the school's part to ensure that Steve would be transported to and from school only *via* school bus.

***Police v. Twinsburg City School Board of Education***, 2002 Ohio 3401 (Ohio App. 2002)

Stephanie Police, a student at Dodge Middle School (OH), was injured when her hand and arm broke through the plate glass portion of a school door. She sued the school district, alleging negligence in installing the door with regular plate glass instead of safety-glazed glass. Stephanie argued that when the school was renovated in 1994, the school district had a duty under Ohio law to replace the plate glass with safety glass, and its failure to replace the glass was proof of negligence. An Ohio appellate court disagreed, holding that although the school district's failure to replace the glass violated Ohio's building code, the violation alone was not proof of negligence. To prove the school district negligent, Stephanie needed to produce evidence that it was reasonably foreseeable that a student would be injured if the glass were broken. The court pointed out that only 4 out of 65 panes of glass at the school had been broken over the past 12 years with no resulting injuries. Therefore, it was not reasonably foreseeable that someone would be injured by the glass.

***Spaid v. Bucyrus City Schools***, 760 N.E.2d 67 (Ohio App. 2001)

Adrienne Spaid, a student at Bucyrus High School (OH), was a student volunteer at a track and field event held at the high school for fifth grade students from Carlisle Elementary School. Adrienne was assigned to the discus-throwing venue where there was no adult supervision. While she was measuring a thrower's distance, someone yelled to watch out. When Adrienne looked up, she was struck in the face by a metal discus. Adrienne suffered injuries to her lower lip, front teeth, lower gums and chin. She filed suit against the Bucyrus City school district, alleging negligent supervision. An Ohio appellate court ruled that Adrienne had a valid claim against the school district for negligence. It rejected the school district's contention that it was entitled to immunity from her suit because the school district's decision not to have adult supervision at the discus throwing venue was within its policy-making or planning powers as a governmental unit. While conceding that the school district was a unit of state government that has policy-making powers, it found that decisions relating to the operation of individual venues at the track and field event did not involve the school district's discretionary policy-making powers. The court pointed out that immunity attached only to the broad type of discretion "involving public policy made with the creative exercise of political judgment." It concluded such immunity did not apply to situations involving the negligence of employees in carrying out the activity, even if they have discretion in making choices regarding how to operate the activity.

***Hull v. Wellston Independent School District***, 46 P.3d 180 (Okla. Civ. App. 2001)

Ty Hull, a student at Wellston High School in Lincoln County (OK), suffered a brain hemorrhage while participating in a football scrimmage between Wellston and Bethel High School's varsity teams. As a result of his injury, Ty was permanently disabled. Ty's mother filed a negligence suit against the school district. The Oklahoma Court of Civil Appeals ruled that under state law the school district was immune from liability for Ty's injury because it occurred while he was participating in an interscholastic event sponsored by the school district, an activity that carried specific immunity. The court rejected Ms. Hull's attempts to get around the state's immunity law by recasting her claim as either negligent or wanton hiring, retaining, training, and supervising of its football coaches. Further the court found that even if Ms. Hull could prove that the school district was guilty of negligent or willful and wanton hiring, retaining, and supervising of the coaches, that conduct was not the proximate cause of Ty's injury. The court pointed out that the sole proximate cause of Ty's permanent disability was the injury he received while participating in the scrimmage.

***Tackett v. Pine Richland School District***, 793 A.2d 1022 (Pa. Commw. 2002)

Sean Tackett was enrolled in Brenda Vrable's advanced chemistry class at Pine Richland High School (PA). Sean sustained severe burns when two classmates ignited ethyl alcohol while conducting an experiment. Although the classroom was equipped with a fume hood to exhaust flammable vapors, Ms. Vrable did not instruct the students to conduct the experiment under the hood. Sean filed suit against the school district and Ms. Vrable. He alleged that the defendants were negligent for failing to have adequate safety equipment on the premises, failing to properly inspect the premises, and permitting a dangerous condition to exist on the premises. The trial court granted the defendants' motion to dismiss the suit on the ground that they were entitled to governmental immunity from liability under state law. A state appellate court affirmed the trial court's ruling that the defendants were immune from suit. The court agreed that a governmental agency would lose its immunity if a dangerous condition arose from the agency's care, custody and control of real property. However, it found that Sean's injuries were not caused by a defect or dangerous condition in the classroom, but rather were caused by Ms. Vrable's failure to properly supervise the students or classroom activity.

***Hill v. Lamberth***, 73 S.W.3d 131 (Tenn. App. 2002)

James Hill was struck by a rock while attending a football game at Houston County High School (TN). He suffered permanent vision loss as result. The rock was thrown by a child playing near the spectator stands. Mr. Hill filed a negligence suit against the school district. He claimed the school district was aware of previous rock throwing incidents but failed to provide adequate security to protect spectators. The Tennessee Court of Appeals dismissed Mr. Hill's claim on the ground that the school district was immune from liability. It concluded that the decision to provide security at games and the level of security provided are discretionary functions involving policy judgments.

***Myers v. Doe***, 52 S.W.3d 391 (Tex. App. 2001)

Mary Doe, a special education student with the cognitive abilities of a 6 to 8 year old, was sexually assaulted by a male classmate in the school elevator. The school developed and implemented a number of new policies and procedures designed to prevent any further sexual assaults on Mary. However, the policies were not enforced, and Mary was assaulted in the elevator on two more occasions. Mary's parents filed suit against the administrators. A state appellate court ruled that the defendants could be held liable for negligent failure to enforce the policies implemented after the first assault on Mary. It rejected the defendants' argument that as professional employees they were entitled to statutory immunity from the parents' claims because the duties imposed by the new policies and procedures implemented after the first assault involved the exercise of judgment and discretion. On the contrary, the court found that the new policies were ministerial because they prescribed the duties to be performed with such precision and certainty as to leave nothing to the exercise of the actor's judgment. As a result, the court refused to grant the defendants immunity from the parents' negligence suit.

# DISABILITIES & SPECIAL EDUCATION

## Supreme Court Opinion

***Barnes v. Gorman***, 122 S. Ct. 2097 (2002)
http://supct.law.cornell.edu/supct/html/01-682.ZS.html

**Issue:** Whether punitive damages may be awarded in private suits brought under the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973.

**Facts:** Mr. Gorman, a paraplegic, was arrested for trespass in Kansas City. Over his objections, he was moved from his wheelchair and strapped into a police van. During the ride to the police station, Mr. Gorman fell to the floor, rupturing his urine bag and injuring his shoulder and back. The police officer fastened him to the floor of the van for the remainder of the trip. Due to these events, Mr. Gorman suffered serious medical problems including a bladder infection, serious lower back pain and uncontrollable spasms in his paralyzed areas, leaving him unable to work full time. He sued the police officials and officers for discriminating against him on the basis of his disability in violation of the ADA and Rehabilitation Act. A jury awarded Mr. Gorman over two million dollars in both compensatory and punitive damages for the police department's failure to maintain appropriate policies for the arrest and transportation of persons with disabilities. The district court vacated the decision as to the punitive damages, holding that punitive damages are unavailable in private suits brought under Title II of the ADA and Rehabilitation Act. The Eighth Circuit Court of Appeals reversed the district court, finding that punitive damages are available under the "general rule" of *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). The court ruled, that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief" for violation of a federal right.

**Holding:** The Supreme Court disagreed and reversed the decision of the Eighth Circuit, holding that punitive damages may not be awarded in private suits brought under Title II of the ADA and the Rehabilitation Act. The Court pointed out that both statutes have incorporated the rights, remedies and procedures available under Title VI of the 1964 Civil Rights Act. Under Title VI and other federal funding statutes, a funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation but also to those traditionally available in breach of contract suits. Title VI mentions no remedies, and punitive damages are generally not available for breach of contract. Nor could it be said that Title VI funding recipients have, merely by accepting funds, implicitly consented to a remedy that is not normally available for contract actions. Therefore, because punitive damages may not be awarded in private suits under Title VI, it follows that they may not be awarded in suits under the ADA or Rehabilitation Act.

## Circuit Court Opinions

***Frazier v. Fairhaven School Committee***, 276 F.3d 52 (1st Cir. 2002)

Kate Frazier, a high school student with learning disabilities, received special education services. After completing her education, Kate filed suit against the Fairhaven School Committee (MA) under Section 1983 seeking money damages. She alleged the school district failed to provide her with a free appropriate public education as required under the Individuals with Disabilities Education Act (IDEA). She also brought a claim under FERPA. The First Circuit Court of Appeals dismissed all of Kate's claims. Regarding the IDEA claim, the court ruled that Kate was required under IDEA to exhaust her administrative remedies before filing a lawsuit. It rejected her argument that she was excused from IDEA's exhaustion requirement because the remedy she was seeking, money damages, is not available in IDEA administrative proceedings. The court concluded that allowing plaintiffs to avoid IDEA's requirements by using a "back door," such as seeking money damages, would circumvent the legislative intent of IDEA that education professionals have the first opportunity to correct shortcomings in a disabled student's IEP. Turning to the FERPA claim, it found that FERPA does not confer a private right of action upon either an aggrieved student or her parents.

***County of Westchester v. New York***, 286 F.3d 150 (2d Cir. 2002)

Westchester County sued the State of New York, alleging that the state program for special education services for pre-school children violates IDEA. The federal district court granted and the Second Circuit Court of Appeals upheld the state's motion to dismiss on the ground that IDEA does not provide counties with a private right to sue the state under IDEA. The court found nothing in the language of the law or the debate in Congress to imply that counties or other local education agencies have the authority to enforce IDEA through the courts.

***Murphy v. Arlington Central School District***, 297 F.3d 195 (2d Cir. 2002)

The parents of Joseph Murphy, a special education student, objected to Arlington Central School District's plan to place him at Arlington High School. The parents instead unilaterally enrolled him in a private school. At a due process hearing challenging the school's proposed educational plan, a hearing officer ruled for the parents and ordered the school district to reimburse them for the cost of the private school tuition. While the case was pending appeal before a state review officer, the parents sued for an injunction requiring the school district to pay the private school tuition costs under the "stay put" provision of IDEA. The school district argued that the parents could not sue until they exhausted their administrative remedies. The Second Circuit Court of Appeals ruled the parents were not required to exhaust their administrative remedies before seeking to enforce the "stay put" provision. Relying on a previous case, the court concluded that a school district could be held financially responsible for a student's private school tuition until the administrative claim challenging the appropriateness of the student's placement was resolved.

***Weixel v. Board of Education***, 287 F.3d 138 (2d Cir. 2002)

Rose Weixel and her mother, Frances Weixel, became involved in a protracted dispute with the New York City Board of Education. The dispute involved the alleged refusal of school officials to acknowledge that Rose, who suffers from chronic fatigue syndrome (CFS), has a disability and provide her with reasonable accommodations based on that disability. When Rose began receiving home instruction, the principal threatened to file neglect and child abuse charges with the Child Welfare Agency (CWA) unless Rose returned to school. In addition, both the principal and school guidance counselor instructed school personnel not to cooperate with Mrs. Weixel. The principal also informed Mrs. Weixel that Rose would only be allowed to return to school if she forfeited her right to be in advanced placement classes. Proceeding *pro se*, Mrs. Weixel filed suit against the board of education in federal district court, raising claims under the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and IDEA. The district court granted the board's motion for summary judgment and dismissed her suit. The Second Circuit Court of Appeals reversed. Addressing the ADA and Section 504 claims, the court stated that the district court erred by requiring Mrs. Weixel to show that Rose was "learning disabled" when the statutes only required that the person have a physical or mental impairment that substantially limits one or more of the person's major life activities. In addition, it found that Mrs. Weixel had a valid retaliation claim under the ADA and Section 504 because Mrs. Weixel was engaged in a protected activity under the statutes, i.e., seeking reasonable accommodations for Rose's condition. Turning to the IDEA claim, the court concluded that Mrs. Weixel's failure to exhaust her administrative remedies as required under IDEA was excused because the defendants failed to advise her of her rights under IDEA. Lastly, the court concluded that Mrs. Weixel had alleged facts sufficient to show Rose was denied the educational placement to which she was entitled because the amended complaint alleged that Rose was denied home instruction and refused advanced placement for discriminatory and retaliatory reasons.

***Beth B. v. Van Clay***, 282 F.3d 493 (7th Cir. 2002), *petition for cert. filed,* 71 U.S.L.W. 3129 (2002)

Beth is a special education student with a cognitive ability between one and six years. She is unable to walk unassisted and communicates primarily by eye gaze. When Beth entered kindergarten in 1994, she was placed in a regular classroom where she received special education services. However, in 1997 the school district developed an IEP that called for Beth to be placed in a self-contained program. Beth's parents wanted her to continue in a regular classroom. The Seventh Circuit Court of Appeals ruled that the school district's placement did not violate IDEA. Addressing the issue of whether Beth was being educated in the least restrictive environment, the court concluded that the "decision to remove Beth from her regular school did not violate the IDEA's mandate to mainstream" students. From an academic perspective, Beth had made little progress in the regular classroom, even with the assistance of aides. As a result, the court agreed with the school district's decision to place her in the self-contained classroom so long as there were opportunities for interaction with non-handicapped students. In sum, the court deferred to the expertise of the school, saying "the school officials' decision about how to best educate Beth is based on expertise that we cannot match."

***Dale M. v. Board of Education of Bradley-Bourbonnais High School District No. 307***, 282 F.3d 984 (7th Cir. 2002)

Parents of a special education student filed suit under IDEA. After prevailing at trial, they were awarded attorneys' fees. Bradley-Bourbonnais High School District No. 307 (IL) paid the attorneys' fees to the parents who in turn paid their attorney, Margie Best. When the Seventh Circuit overturned the Illinois district court's decision, it ordered Ms. Best to return the attorneys' fees to the school district. Ms. Best claimed that the court lacked jurisdiction over her because the fees were paid to her clients, not her, and that she was not a party to the suit. The court rejected Ms. Best's argument, pointing out that courts have inherent power to order attorneys appearing before the court to comply with the court's order. It found that Ms. Best had no right to the fees. The court concluded by stating, "[A]ll courts possess an inherent power to prevent unprofessional conduct" by attorneys appearing before them.

***Costello v. Mitchell Public School District 79***, 266 F.3d 916 (8th Cir. 2001)

Throughout elementary school, Sadonya Costello received special education services. However, when she entered middle school at Mitchell High School (NE), it was determined that she was no longer eligible for special education services. School staff informally monitored her performance during her first semester of seventh grade. Several weeks into the semester her parents, James and Jamie Costello, became aware she was not receiving special education services. Sadonya's grades were average during the first quarter, but dropped in the second quarter. By the end of the semester she was failing band. She encountered problems with her band teacher, Roger Kercher, who humiliated and belittled her in front of the class. School officials eventually transferred her out of band to a music appreciation class that was also taught by Mr. Kercher. Her performance continued to decline during the second semester, and she was diagnosed as suffering from depression and suicidal thoughts. Her parents began home schooling her. They filed suit, alleging violations of Sadonya's due process and equal protection rights. They also claimed violations of IDEA, ADA and Section 504. The Eighth Circuit Court of Appeals ruled that there were no due process violations. It also concluded that there was no equal protection claim based on Sadonya's removal from band because her removal was rationally related to the legitimate purpose of providing her with a public education conducive to learning. The court also ruled that there were no valid IDEA, ADA, or Section 504 claims. It dismissed the IDEA claim on two grounds: (1) the parents failed to establish Sadonya had a verified disability; and, (2) even though the school failed to notify the parents that special education services were being discontinued when she entered middle school, the failure to give notice as required by IDEA did not result in loss of educational opportunity for Sadonya. The court dismissed the ADA and Section 504 claims on the ground that the parents had failed to show Sadonya was disabled within the meaning of either of the laws.

***Cudjoe v. Independent School District No. 12***, 297 F.3d 1058 (10th Cir. 2002)

Scottie Carrington was enrolled in Independent School District No. 12 (OK). After Scottie was diagnosed with Epstein-Barr virus, he was unable to attend school. As a result, the school district developed an individual accommodation plan (IAP) pursuant to Section 504 of the Rehabilitation Act to provide him with homebound education services, including a teacher. Although the school district allowed Scottie's mother to request teachers from outside the district, it reserved the right to make the final decision. When the school district rejected the mother's requested teacher for his junior year of high school, she sued. The Tenth Circuit Court of Appeals ruled that the mother must exhaust the administrative remedies available under IDEA before bringing her disability claim in federal court. It concluded that the availability of administrative remedies under IDEA turns not on whether a student is identified under that statute but rather whether his physical or mental disability renders him eligible for services. It found that Scottie's chronic fatigue would be considered a health impairment that adversely affects his educational performance, making him eligible for educational services under IDEA.

## Federal District Court Opinions

***R.M. v. Vernon Board of Education,*** 208 F. Supp. 2d 216 (D. Conn. 2002)

J.M., a twenty-two year old special education student, suffered from multiple disabilities, including mild to moderate mental retardation. He lived in a group home until he exhibited dangerous behavior. After being hospitalized for treatment, he was placed in a residential educational/vocational program by the Vernon School District (CT). After exhausting administrative remedies, J.M.'s mother filed suit in federal district court. She claimed that J.M.'s right to a free appropriate public education under IDEA had been violated when he was placed in the residential educational/vocational facility rather than a community-based group home. She requested that the court issue a preliminary injunction ordering the school district to provide J.M. with two years of compensatory education in a community-based group home setting, arguing that if J.M was denied such relief, he would suffer irreparable harm in the form of lost educational and treatment opportunities. The court declined to issue the preliminary injunction ordering J.M.'s placement in a community-based group home. It found that the evidence presented by both parties did not establish that J.M. was facing "actual and imminent" harm due to his present educational and residential placement. As a result, the court concluded that J.M.'s mother had not established that J.M. would suffer irreparable harm in the absence of the court granting a mandatory injunction requiring Vernon to place him in a community-based group home.

***Patrick W. v. Lemahieu,*** 165 F. Supp. 2d 1144 (D. Haw. 2001)

Patrick and Kathy W., parents of an autistic student, filed suit for money damages against the Hawaii public school system. They alleged violation of IDEA and Section 504 of the Rehabilitation Act. The school system asserted that it was entitled to sovereign immunity under the Eleventh Amendment from the Section 504 claim. It argued that the U.S. Supreme Court decision in *University of Alabama Board of Trustees v. Garrett*, finding that Congress could not validly abrogate states' Eleventh Amendment immunity under Title I of the ADA, extended to Section 504 of the Rehabilitation Act because Title II of the ADA was modeled after Section 504. The federal district court ruled that the school system was not entitled to sovereign immunity under the Eleventh Amendment. First, the *Garrett* decision's scope was limited to Title I of the ADA. Second, the Supreme Court in *Garrett* did not address the issue of whether Congress could validly abrogate states' Eleventh Amendment immunity under Section 504 of the Rehabilitation Act.

***Long v. Board of Education, District 128,*** 167 F. Supp. 2d 988 (N.D. Ill. 2001)

Matthew Long, a student at Libertyville High School (IL), was banned from participating in lacrosse and football for violating the code of conduct for students participating in extracurricular activities. Matthew filed suit to prevent the school from enforcing the ban. He argued his suspension from athletic competition was discriminatory under the ADA and Section 504 because the school knew that his violation of the code was related to a disability. Matthew also contended that even if the school was not aware of his disability at the time it suspended him from participation, it failed to provide him with a reasonable accommodation after the school learned of the disability. A federal district court ruled that Matthew was not entitled to relief from the school's enforcement of the code of conduct against him. The court accepted the school's assertion that it had no knowledge of Matthew's disability at the time it banned him from participating on the lacrosse team. It then addressed the issue of whether allowing him to play despite the code violation was a reasonable accommodation. The court concluded such an accommodation would not be reasonable, since it would leave the school open to repeated court challenges to any enforcement of the code, preventing the school from enforcing the code until the student challenging the disciplinary action exhausted all his legal remedies.

***Cruz v. Pennsylvania Interscholastic Athletic Association,*** 157 F. Supp. 2d 485 (E.D. Pa. 2001)

Luis Cruz was a 19-year-old special education student at Ridley High School (PA). Due to his intellectual limitations, Luis did not enter high school until he was 16 years old. Participation in varsity sports was included in his IEP because it allowed him to socialize with others. The Pennsylvania Interscholastic Athletic Association (PIAA) prohibited students 19 years old and above from competing in interscholastic sports. When Luis's request for a waiver of the age rule was rejected by the PIAA, he filed suit under IDEA, the ADA and Section 504. The court ruled that Luis had a valid claim under the ADA. It ruled that the PIAA's maximum-age rule was not an "essential eligibility requirement" within the meaning of the ADA. As a result, the court concluded that the rule did not automatically exclude Luis, a 19-year-old special education student, from the ADA definition of "qualified individual with a disability." The court, therefore, held that the ADA required the PIAA to at least entertain Luis's waiver request for two additional semesters of eligibility.

***Falzett v. Pocono Mountain School District,*** 150 F. Supp. 2d 699 (M.D. Pa. 2001)

As a result of an illness, Tiber Falzett was forced to receive homebound schooling for part of seventh grade and all of eighth grade. When Tiber's parents and the school were unable to agree to IEP terms, the parents placed him in a private school. The parents filed suit under IDEA, seeking tuition reimbursement and compensatory damages. The federal district court dismissed the suit. It ruled that because the suit was brought under IDEA, the parents were required to exhaust all the administrative remedies available to them under IDEA before bringing suit in court. The court rejected the argument that the parents were excused from satisfying this requirement because the administrative process would have been futile. The court also concluded that the parents were not excused from the exhaustion requirement because they were seeking money damages, which are not available under IDEA.

***Girty v. School District of Valley Grove,*** 163 F. Supp. 2d 527 (W.D. Pa. 2001)

Spike Girty, a student with severe to moderate mental retardation, was placed in full-time regular education with a child-specific aide when he entered fourth grade. However, when he entered sixth grade, Valley Grove School District (PA) proposed changing his placement from regular education to part-time life skills support. This change would entail transferring Spike to a school outside the district. Spike's parents objected to the proposed change in placement on the ground that it violated the "mainstreaming" requirement of IDEA. The federal district court agreed with the parents and ordered the school district not to implement its proposed change in placement. The court considered three factors in determining that Valley Grove School District had failed to satisfy IDEA's mainstreaming requirement. First, it found that the school district had failed to make reasonable efforts to accommodate Spike in regular education because it had not considered the full range of available supplemental aids and services appropriate to his particular disabilities. Second, it found that the educational benefits that Spike would receive in regular education with supplementary aids and services outweighed the educational benefits he would receive in a segregated, special education classroom. Third, it concluded that Spike's inclusion in a regular education class did not have a negative effect on the education of the other students. However, the court also ruled that it was not requiring Valley Grove to return Spike to full-time placement in regular education. Instead, it directed the school district to consider the full range of available supplementary aids and services in developing an individual education plan for Spike that fully complies with IDEA's mainstreaming requirement.

***Molly L. v. Lower Merion School District,*** 194 F. Supp. 2d 422 (E.D. Pa. 2002)

Molly L., a student suffering from severe asthma, gross motor difficulties, and extreme sensitivity to sensory stimulation, was enrolled in first grade in the Lower Merion School District (PA). Because of her physical limitations, the school district classified her as disabled pursuant to Section 504 of the Rehabilitation Act. It prepared a service agreement to provide Molly with accommodations to address her disabilities. However, Molly's parents rejected the agreement and unilaterally placed her in a private school. After an administrative hearing officer rejected the parents' demand for reimbursement for the private school tuition, Molly's parents filed suit in federal district court. The court granted the school's motion for summary judgment. It ruled that the service agreement as developed by the school district was appropriate because it provided "significant learning" and conferred the "meaningful benefit" embodied in Section 504's free appropriate public education requirement. The court found that each of the accommodations provided by the school district served the dual purposes of allowing Molly the freedom to develop coping skills while ensuring her health and safety.

***Timothy B. v. Neshaminy School District***, 153 F. Supp. 2d 621 (E.D. Pa. 2001)

Timothy B., a special education student suffering from Tourette's Syndrome, was suspended for the remainder of the school year after he made threatening remarks to the principal. His parents claimed he was suspended without a hearing to determine whether his actions were a manifestation of his disability. In response, the school district requested a due process hearing pursuant to IDEA, but failed to appear and participate in the hearing. The parents then petitioned for a due process hearing, requesting that the school district provide Timothy with a free appropriate public education for the following school year. The school district again failed to appear at the scheduled hearing. The parents also claimed that the school district failed to comply with the hearing officer's decision and order. As a result, the parents filed suit under IDEA, seeking compensatory damages, along with other relief. They argued that they were exempt from the requirement that they exhaust all administrative remedies under IDEA before bringing a lawsuit because to do so would be futile. The federal district court agreed. It concluded that the parents' allegations that the school district failed to appear at two due process hearings and ignored a hearing officer's decision and order were sufficient to show that the school district's actions impeded and frustrated any further attempts to pursue administrative remedies.

## State Lower Court Opinions

***Lagares v. Camdenton R-III School District***, 68 S.W.3d 518 (Mo. App. 2001)

After Dennis Lagares, an elementary student in the Camdenton R-III School District (MO), was identified as being learning disabled, the school district developed an IEP to provide him with special education services. His parents objected to the IEP and eventually withdrew Dennis to be home schooled. They requested a due process hearing, claiming Dennis had been denied a free appropriate public education as required under IDEA and the state special education statute. When the hearing officer found in favor of the school district, the parents filed suit. They argued: (1) the state standard for a free appropriate public education was more stringent than the standard under IDEA; and, (2) the school district had failed to satisfy the higher state standard. A state appellate court ruled that Camdenton had failed to provide Dennis with a free appropriate public education. It agreed with the parents that the standard imposed by state law to "maximize the capabilities" of special education students was higher than that imposed by IDEA. It pointed out that the standard imposed by IDEA was a minimum standard and that states were free under IDEA to impose a more stringent standard. As a result, the court held that the hearing officer should have reviewed the school district's IEP under the higher state standard, and having done so should have found that the school district failed to provide Dennis with a free appropriate public education.

***Delaware Valley School District v. Daniel G.***, 800 A.2d 989 (Pa. App. Ct. 2002)

Daniel G., a special education student with learning disabilities, was attending school in the Delaware Valley School District (PA). Concerned with Daniel's progress in public school, his parents unilaterally placed him in a private school. Pursuant to IDEA, the school district requested a due process hearing. The hearing officer concluded that the school district had failed to offer Daniel appropriate placements based on the lack of meaningful progress in grades 2 through 6. Finding the parents' private school placement appropriate, the hearing officer ordered the school district to reimburse the parents for tuition and expenses. A Pennsylvania appellate court overturned the hearing officer's order, ruling that the school district was not required to reimburse the parents. The court concluded that the placements provided by the school district for Daniel were appropriate. His two months of progress in reading over ten instructional months demonstrated that he had received educational benefits from the school district's program. Under the free appropriate public education requirement of IDEA, school districts must provide special education students with some educational benefit.

## RELIGION

### Supreme Court Opinions

***Simmons-Harris v. Zelman***, 122 S. Ct. 2460 (2002)
http://a257.g.akamaitech.net/7/257/2422/27jun20021045/www.supremecourtus.gov/opinions/01pdf/00-1751.pdf

**Issue:** Whether the Cleveland voucher program violates the First Amendment's Establishment Clause.

**Facts:** The Cleveland voucher program gives tuition money to families with children in kindergarten through the eighth grade, with preference given to students from families with income that is less than 200 percent of the poverty level. Scholarship checks, although made payable to the parent, are mailed directly to the child's school. The parent is then required to endorse the check over to the private or public school in which the child is enrolled. In the 1999-2000 school year, 3,761 students enrolled in the program, and 60 percent of the enrollees were from families at or below the poverty level. Of these students, 3,632 (96 percent) were enrolled in sectarian schools.

The U.S. District Court for the Northern District of Ohio found the Cleveland pilot voucher program unconstitutional. The state appealed to the Sixth Circuit. The state argued that the voucher program does not violate the Establishment Clause because the vouchers are available to low-income parents to use for either public or private schools participating in the program. The Sixth Circuit found *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), controlling on the issue of whether the voucher program that provides public funds to pay for private school tuition for low-income students violates the Establishment Clause. It found that the Cleveland voucher program could not be factually distinguished from *Nyquist* in a way that would free the program "from the reach of the [Establishment] Clause's constitutional prohibition."

**Holding:** In a 5 to 4 split, the Supreme Court ruled that Cleveland's school voucher program does not violate the First Amendment's Establishment Clause. Chief Justice Rehnquist, writing for the Court, found that the program was enacted for the valid secular purpose of providing Cleveland's poorest children with educational alternatives to the city's admittedly failing public school system. He concluded that the program was consistent with previous cases because the Cleveland program is neutral in all respects toward religion and is merely one of several educational opportunities that the State of Ohio provides its school children. The majority rejected the Sixth Circuit's reasoning that the prevalence of Catholic schools in the program created a perception of government endorsement of religion. Instead, the Court concluded that a reasonable observer would infer that the predominance of Catholic schools was a product of demographics rather than design by the state to advance religion. The majority asserted "that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of numerous independent decisions of private individuals, carries the imprimatur`of government endorsement."

***Watchtower Bible & Tract Society of New York v. Village of Stratton***, 122 S. Ct. 2080 (2002)
http://supct.law.cornell.edu/supct/html/00-1737.ZS.html

**Issue:** Whether the Village of Stratton's ordinance prohibiting door-to-door advocacy violates the First Amendment.

**Facts:** The Village of Stratton enacted an ordinance that prohibited "canvassers" from "going in and upon" private property to promote any "cause" without obtaining a permit from the mayor's office. The Watchtower Bible & Tract Society of New York, a congregation of Jehovah's Witnesses, filed suit against the Village, alleging that the ordinance violated their First Amendment rights to the free exercise of religion, free speech, and freedom of the press. The district court upheld most of the ordinance as valid, "content-neutral regulations" but did require the Village to narrow some of the provisions. The Sixth Circuit Court of Appeals affirmed, again holding that the ordinance was "content neutral and of general applicability and therefore subject to intermediate scrutiny." The Sixth Circuit also concluded that the

Village's interests in protecting its residents from fraud and undue annoyance were sufficient to justify the ordinance.

**Holding:** The Supreme Court reversed the decision, holding that the Village's ordinance violates the First Amendment as it applies to religious proselytizing, anonymous political speech, and the distribution of handbills. The Court held that there was a serious concern over the amount of speech covered by the regulation. The ordinance does not pass First Amendment scrutiny because it is overbroad and not individually tailored to the Village's stated interests. Even if the interest in preventing fraud could satisfactorily support the regulation as it applies to commercial solicitations, that interest provides no support for its application to religious organizations or individuals involved in political campaigns.

## Circuit Court Opinions

***Altman v. Bedford Central School District,*** 245 F.3d 49 (2d Cir. 2001), *cert. denied,* 122 S. Ct. 68 (2001)

The parents of several elementary, middle and high school students in the Bedford Central School District (NY) filed suit alleging that several school activities violated the students' rights under the Establishment and Free Exercise Clauses. The activities involved teaching about Ganesha, a Hindu god, making worry dolls, celebrating Earth Day, and listening to a nature tape. On appeal, the Second Circuit Court of Appeals ruled that the school district's activities did not violate either the Establishment or Free Exercise Clause. It found a reasonable person observing the activities would not view them as endorsing religion. The court also concluded that the voluntary nature of participation in the Earth Day celebration precluded it from finding that the ceremonies burdened any student's ability to freely exercise his/her religious beliefs. The U.S. Supreme Court declined to review the case.

***Brown v. Gilmore***, 258 F.3d 265 (4th Cir. 2001), *cert denied,* 122 S. Ct 465 (2001)

The Commonwealth of Virginia enacted a law requiring all public schools in the state to observe a minute of silence in classrooms during which "each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice." Several students challenged the mandatory minute of silence, arguing that the law violated the Establishment Clause because the minute of silence is, in effect, school-sponsored prayer. The Fourth Circuit Court of Appeals rejected the students' argument. The court concluded that the law had the secular purpose of allowing students time to reflect, meditate or pray as was their choice at the beginning of the school day. It also found that the law did not have the primary effect of advancing or inhibiting religion because the prayer is just one of many options that students can choose to exercise during the minute of silence. Lastly, the court concluded that the law as written avoided excessive entanglement between government and religion because teachers' sole duty under the law is to observe and enforce the period of silence during which students exercise their options. The U.S. Supreme Court declined to review the case.

***Gernetzke v. Kenosha Unified School District No. 1,*** 274 F.3d 464 (7th Cir. 2001), *cert. denied,* 122 S. Ct. 1606 (2002)

School officials at George N. Tremper Senior High School (WI) invited all student groups to submit murals for display in the main hallway. The Bible Club submitted a mural depicting a heart, two doves, a Bible open to a well-known New Testament passage, and a large cross. The principal approved the mural with the exception of the cross, because he viewed the cross as a Christian symbol that would invite lawsuits against the school for violating the Establishment Clause. Two members of the Bible Club filed suit, alleging that exclusion of the cross violated the Equal Access Act (EAA) and their free exercise of religion rights. The Seventh Circuit Court of Appeals rejected the students' EAA claim. It found that exclusion of the cross from the mural was not discrimination based on religious content, but rather an exclusion based on the principal's reasonable belief that allowing the cross would lead to litigation or disorder. Quoting the Equal Access Act, the panel stated that there is nothing that "limit[s] the authority of the school . . .to maintain order and discipline on school premises." As a result, it concluded that maintaining order and discipline in school was a legitimate defense to challenges based on viewpoint or content discrimination under either the EAA or the Free Speech Clause of the First Amendment. Turning to the free exercise claim, the court rejected it without reaching the merits. Pointing out that a school district could only be held liable under Section 1983 if the employee whose actions were being challenged had final decision-making authority, it concluded that the students had failed to demonstrate that Principal Pulaski had such authority. The panel also expressed its doubt regarding "the appropriateness of litigation that is intended ... to wrest the day-to-day control of our troubled public schools from school administrators and hand it over to judges and jurors who lack both knowledge of and responsibility for the operation of the public schools."

***Newdow v. U.S. Congress***, 292 F.3d 597 (9th Cir. 2002), *stay granted*, (9th Cir. 2002)

Michael Newdow, a parent of a child attending school in the Elk Grove Unified School District (CA), objected to his daughter having to listen to the daily recitation of the Pledge of Allegiance by her classmates. Mr. Newdow's objection was based on the words "under God." The class recited the Pledge daily in conformity with California statutes requiring that each day begin with "appropriate patriotic exercises." He filed suit in federal court, alleging an Establishment Clause violation. The Ninth Circuit Court of Appeals ruled that the inclusion of the phrase "under God" in the Pledge violated the First Amendment's Establishment Clause because the phrase was a direct profession of religious belief. Even though nonbelievers may opt out of saying the Pledge, they are placed in the untenable position of choosing between tacitly participating in an exercise with religious content or protesting. Lastly, the court concluded that the phrase has no secular purpose. Referring to the legislative history of the 1954 Congressional act, the court found that Congress's primary purpose for including "under God" was to advance religion.

***Orin v. Barclay***, 272 F.3d 1207 (9th Cir. 2001), *cert denied*, 122 S. Ct. 2661 (2002)

Benjamin Orin, a member of an anti-abortion group known as Positively Pro-Life, received permission from Richard Barclay, the Interim Dean of Students at Olympic Community College, to conduct a protest on campus. Mr. Barclay imposed three conditions: (1) Orin's group was not to breach the peace or cause a disturbance; (2) they were not to interfere with campus activities or access to buildings; and, (3) they were not to engage in religious worship or instruction. While large crowds gathered on and off during the protest, there were no threats of violence, or interference with other activities or access to buildings. However, when Mr. Orin referred to God and the Bible, campus security told them to leave. Mr. Orin refused and the police were called to arrest his group. Mr. Orin filed suit, claiming that the school violated his free speech rights when it had his group arrested for making religious references during their protest. A federal appellate court agreed with Mr. Orin that his First Amendment right to freedom of speech had been violated. It found that when Mr. Barclay gave Mr. Orin permission to protest on campus, he created an open forum for the demonstrators' expression. Having done so, the court concluded that Mr. Barclay could only prohibit religious expression if the restriction served a compelling state interest and was narrowly drawn to achieve that end. It ruled that prohibiting religious speech based on Establishment Clause concerns was not a compelling interest.

***Fleming v. Jefferson County School District No. R-1***, 298 F.3d 918 (10th Cir. 2002)

After the shootings at Columbine High School, two faculty members proposed that students be allowed to paint tiles to be displayed in the hallways of the school. The school district approved the project but prohibited tiles referring to the attack, the date of the attack, and the names or initials of students. Columbine ribbons, religious symbols, or obscene or offensive speech also could not appear on the tiles. Several participants whose tiles were rejected based on their religious content or the date of the attack sued, claiming the restrictions violated their free speech rights. The Tenth Circuit Court of Appeals found no free speech violation. The tile project constituted school-sponsored speech because the public might reasonably perceive the messages to bear the imprimatur of the school. Schools may regulate such speech for legitimate pedagogical reasons. Prohibiting messages with references to the shootings or religion is reasonably related to the school's interests in maintaining the building as a positive learning environment rather than as a memorial to the tragedy and avoiding divisiveness and disruption from unrestrained religious debate.

***Summum v. City of Ogden*,** 297 F.3d 995 (10th Cir. 2002)

Since 1966, a monument inscribed with the Ten Commandments has been displayed on the lawn outside the municipal building in Ogden, Utah. A religious group, known as Summum, requested the city to display a monument bearing the seven principles of its religion. When the city denied the request, Summum sued the city for violating its free speech rights. It also asserted that the display of the Ten Commandments violated the Establishment Clause. The U.S. Court of Appeals for the Tenth Circuit ruled that while there was no Establishment Clause violation, the city's refusal to display Summum's seven principles did violate the group's free speech rights. The Tenth Circuit agreed that the municipal building's lawn is a nonpublic forum from which the city may exclude speakers so long as the basis for exclusion is reasonable and viewpoint neutral. However, it found that excluding Summum's monument while displaying the Ten Commandments was not reasonable and viewpoint neutral.

***Adler v. Duval County School Board*,** 250 F.3d 1330 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 664 (2001)

Duval County School Board enacted a policy allowing the graduating high school class to elect a student to deliver a speech during graduation ceremonies. School officials exercise no control over the election process or the content of the speech. Several students filed suit alleging that the policy on its face violated the Establishment Clause. Although the Eleventh Circuit Court of Appeals initially ruled that the policy did not violate the Establishment Clause, that decision was vacated after the U.S. Supreme Court ruled in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), that a school board's policy permitting students to vote on delivery of a "statement or invocation" at football games violated the Establishment Clause. After reconsidering Duval County's policy in light of the Supreme Court's ruling in *Santa Fe*, the appellate court again ruled that the policy on its face did not violate the Establishment Clause. The appellate court found that there were crucial differences between Santa Fe and Duval's policies. Specifically, the Santa Fe School Board retained control over the content of the speech, while Duval exercised no such control. As a result, it agreed that Santa Fe's policy constituted state-sponsored speech rather than private speech. However, it found no such defect in the Duval policy because the control over content of the speech was left to the student speaker. Referring to the Santa Fe school district's long tradition of public prayer before football games, the appellate court also noted, that unlike the Santa Fe policy, the Duval policy did not "by its terms, invite and encourage religious messages." The U.S. Supreme Court declined review.

## Federal District Court Opinions

***McCarthy v. Boozman*,** 212 F. Supp. 2d 945 (W.D. Ark. 2002)

The Arkansas law requiring all school children to have age-appropriate immunizations to attend school contains an exemption based on parental religious beliefs. To qualify for the exemption, the parent must be affiliated with a denomination or church recognized by the state as having religious objections to immunization. Dan McCarthy applied for the exemption for his daughter based on his unaffiliated religious beliefs. When the state department of health rejected his application, Mr. McCarthy sued in federal court. He claimed that the statute violated his First Amendment guarantee of free exercise of religion and his Fourteenth Amendment equal protection rights. The district court ruled that the Free Exercise Clause does not require the state to provide a religious exemption from school immunization laws. But if it does, the exemption cannot be limited to those who are members or adherents of a church or religious denomination recognized by the state.

***Lassonde v. Pleasanton Unified School District*,** 167 F. Supp. 2d 1108 (N.D. Cal. 2001)

As a co-salutatorian of the Amador Valley High School (CA) class of 1999, Nicholas Lassonde was scheduled to speak at the graduation ceremony subject to Principal Bill Coupe's approval of the content of the speech. Mr. Coupe determined that Nicholas's speech included proselytizing comments that would violate the Establishment Clause and refused to allow him to give the speech. After several discussions, Nicholas agreed under protest to deliver the speech without the proselytizing language in exchange for being allowed to distribute written copies of the unedited speech outside the ceremony site. Nicholas filed suit against the school district, principal, assistant superintendent and superintendent in their official and individual capacities, alleging violation of his free speech, religious liberty, and equal protection rights. A federal district court ruled that the school district and its employees in their official capacities were entitled to sovereign immunity from Nicholas's suit under the Eleventh Amendment. Regarding the claims against the officials in their individual capacities, the court concluded that Nicholas had failed to establish a claim based on free speech, religious liberty, or equal protection. It found that neither the free speech nor the religious liberty claims were valid because the restrictions placed on proselytizing speech at graduation ceremonies were necessary to avoid an Establishment Clause violation. The court found no equal protection violation based on religious discrimination because the restriction on religious speech also furthered the compelling state interest of avoiding an Establishment Clause violation.

***Jabr v. Rapides Parish School Board***, 171 F. Supp. 2d 653 (W.D. La. 2001)

Hesen Jabr, a member of the Islamic faith, attended fifth grade at Paradise Elementary School (LA). One day the entire fifth grade was instructed by school personnel to report to the principal's office. As each student entered Principal John Cotton's office, he presented the student with a copy of the New Testament of the Bible. Mr. Cotton claimed that it was clear to all the students that it was a present that they were free to refuse. Hesen's parents filed suit against the school district, claiming that Mr. Cotton's distribution of Bibles at school violated the Establishment Clause of the First Amendment. The court found that the school district had failed to express any secular purpose for Principal Cotton's practice of handing out of Bibles in his office. In addition, it found that the practice of distributing copies of the New Testament "unabashedly" conveyed an endorsement of Christianity. Lastly, it found that Principal Cotton became excessively entangled with religion by distributing the Bibles in his capacity as a school district administrator. The federal district court ruled that the distribution of Bibles to elementary school students by the principal violated the Establishment Clause.

***Turner v. Liverpool Central School***, 186 F. Supp. 2d 187 (N.D.N.Y. 2002)

In the process of registering her daughter for kindergarten, Kelly Turner informed Liverpool School District (NY) that the child had not received any immunizations because immunizations are contrary to their religious beliefs. Liverpool refused to enroll the child without the immunizations. Ms. Turner filed suit in federal district court, alleging that the school district had violated her constitutional rights when it failed to honor the religious exemption to the state's mandatory immunization law. Liverpool moved for a dismissal, alleging that a religious exemption would violate the Establishment Clause. The district court, applying the *Lemon* test, rejected Liverpool's argument and ruled in favor of the family.

***Mellen v. Bunting***, 202 F. Supp. 2d 511 (W.D. Va. 2002)

Two cadets at Virginia Military Institute (VMI), a public state military college, challenged the school's practice of reciting a daily supper prayer on the grounds that it violated the Establishment Clause of the First Amendment, the Virginia Constitution, and the Virginia Act for Religious Freedom. The cadets argued that the setting and manner in which the prayers are conducted constitute state-sponsored religious speech. VMI countered that the prayers are merely one component in what is an overwhelmingly secular ceremony. VMI also contended that the prayer serves an educational purpose because it provides cadets with the opportunity for reflection and spiritual development. VMI also cast its prayer practice as a long-standing tradition, such as state legislatures opening their sessions with a prayer, which the U.S. Supreme Court has recognized as constitutional because the practice was in place at the time the First Amendment was drafted. In the alternative, VMI defended the prayer practice as an exercise in academic freedom. A federal district court rejected all of VMI's arguments. It found VMI's analogy between its practice of supper prayers and the practice of state legislatures opening their sessions with prayer without merit because it was not one of those long-standing ceremonial practices that predated the U.S. Constitution. The court also concluded that VMI's academic freedom argument was without merit because a school's right to academic freedom can never infringe on individual students' First Amendment rights. The court applied the three-prong test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to determine if VMI's supper prayer practice satisfied the requirements of the Establishment Clause. Turning to *Lemon's* second prong, it found that the supper prayers have the primary effect of advancing religion. It concluded that the rigid discipline imposed on cadets coerced their participation in prayers. Regarding the third prong of the *Lemon* test, the court concluded that there was excessive government entanglement with religion because the prayers were authorized by government policy, took place on government property and were read each night at the direction of the school superintendent.

## Federal District Court Opinions

***Moeller v. Schrenko***, 554 S.E.2d 198 (Ga. App. 2001)

Rebecca Moeller, a ninth grade student at Columbus High School (GA), objected to the textbook *Biology Principles and Exploration* on the ground that it violated the Establishment Clause because it denigrated her belief in creationism. She also contended that the book infringed on her right to free exercise of her religious beliefs. Specifically, she objected to the textbook's statements that belief in divine creation fell outside the realm of science because it cannot be tested by scientific methods, and that the hypothesis that life originated naturally and spontaneously was unproven. The state appellate court ruled that the textbook neither violated the Establishment Clause nor infringed on her right to free exercise of religion. The court found nothing in the textbook's discussion of the origin of life that denigrated creationism. The court also found that although the book's neutral statements that creationism cannot be subjected to scientific proof might be offensive to Rebecca's religious beliefs, they did not prevent her from practicing her religious beliefs.

# ATHLETICS

## Federal District Court Opinions

***Communities For Equity v. Michigan High School Athletic Association***, 137 F. Supp. 2d 910 (W.D. Mich. 2002)

The U.S. District Court for the Western District of Michigan rejected a plan designed to remedy the problem of unequal sports season schedules for male and female public school athletes. The plan was developed in response to the court's earlier finding that the Michigan High School Athletic Association's (MHSAA) schedule for high school sports violated female athletes' Fourteenth Amendment equal protection and Title IX rights. The court rejected the MHSAA's proposal to reverse the seasons for girls' golf, swimming, and tennis with the boys' seasons in the same sports because it would leave girls' basketball, volleyball, and soccer in disadvantageous seasons. The court noted that girls participating in basketball, volleyball, and soccer represent 35.7% of all female sports participants while boys participating in the sports that would be moved to disadvantageous seasons, i.e., golf, swimming, and tennis, represent only 20.4% of all male participants. Based on this disparity, the court ruled that it would be impossible for the proposed plan to satisfy the gender equity requirements of Title IX and equal protection. As a result, the court ordered the MHSSA to choose among three options offered by the court.

***Angstadt v. Midd-West School District***, 182 F. Supp. 2d 435 (M.D. Pa. 2002)

Megan Angstadt had been home schooled from third grade through middle school. Megan also desired to play interscholastic girls' basketball. However, school district policy prohibited home-schooled students from participating in extracurricular activities. Megan's parents obtained an exception to the policy from the school board, allowing her to play on the girls' seventh/eighth grade team during the 1999-2000 and the 2000-2001 years. Knowing that it was unlikely that the board would grant Megan another exception, the parents enrolled her in the Western Pennsylvania Cyber Charter School. They notified the school district that under the state charter school law and district policy, Megan was eligible to participate on the girls' junior varsity basketball team. When the school district refused to allow Megan to join the team, her parents filed suit. They sought to obtain a preliminary injunction ordering the school district to allow Megan to play during the current season. A federal district court ruled in favor of the school district and denied the parents' request for a court order. The court stated that to issue a preliminary injunction it needed to find: (1) that it was more likely than not that the parents' argument would succeed if the case went to trial; and (2) that Megan would suffer irreparable harm if she was prevented from playing during the current season. Regarding the first issue, it concluded that it was unlikely that the parents would succeed at trial for two reasons. First, the court found that it was unclear whether cyber schools fell within the coverage of the state's charter school law. Second, the court concluded that even if the charter school law was applicable to cyber schools, it was unclear whether Megan's property interest in participating in extracurricular activities rose to a level entitled to Fourteenth Amendment due process protection. Turning to the second issue, the court found that the parents had failed show that Megan would suffer irreparable harm if she were barred from participating on the team.

## State Lower Court Opinions

***Ryan v. California Interscholastic Federation***, 114 Cal. Rptr. 2d 787 (App. 2001)

John Ryan completed high school in his native Australia. However, he sought to repeat twelfth grade in the United States to obtain the credits necessary to satisfy NCAA's eligibility requirements to participate in intercollegiate basketball. To that end, John enrolled in Rancho Buena Vista High School (CA). When the California Interscholastic Federation (CIF) declared him ineligible to compete in interscholastic sports based on its eight semesters of eligibility rule, he filed suit. John sought to gain athletic eligibility and recover compensatory damages. While John was successful in obtaining athletic eligibility, a jury rejected his claim for compensatory damages. However, he was awarded attorneys' fees. The state appellate court overturned the award of attorneys' fees on the ground that he failed to meet his burden under state law that his suit "conferred a significant benefit on a large class of people and its costs disproportionately transcended his personal interest in the matter." The appellate court concluded that his suit had not benefited a large class of people because the trial court's decision was fact-specific and left larger questions regarding the effect of the CIF's eight-semester eligibility rule on all high school students unanswered. It also found that John's costs of pursuing the suit were not disproportionate to his primary interest in obtaining athletic eligibility.

***Florida High School Activities Association, Inc. v. Marsonek***, 805 So.2d 868 (Fla. App. 2001)

A Florida appellate court ruled that a state trial court had improperly held an *ex parte* hearing in which it granted an injunction prohibiting the Florida High School Activities Association (FHSSA) from suspending a high school football player from playing in a playoff game. Patrick Marsonek, a player on Jefferson High School's football team, was assessed a one-game suspension by the FHSSA after receiving two unsportsmanlike-conduct fouls during a game. Jefferson's playoff game was scheduled for a week later during the Thanksgiving holiday weekend. On the Wednesday before Thanksgiving, Patrick filed suit seeking emergency relief from the suspension. He contended that if he were required to give the FHSSA notice before proceeding with his request, he would suffer irreparable harm because the game would be played before the hearing could be held. The trial court allowed the hearing to proceed *ex parte* and issued an order prohibiting the FHSSA from imposing the one-game suspension. The appellate court took the case even though the issue of whether Patrick should be allowed to participate in the game was moot because the situation involving a player seeking an *ex parte* hearing to overturn a FHSSA-imposed suspension was likely to occur again. The court concluded that the trial court had improperly allowed Patrick an *ex parte* hearing, because the trial court failed to provide any factual explanation for why Patrick was unable to provide notice to the FHSSA and its order imposing the injunction failed to state why any possible injury would be irreparable.

## GOVERNANCE

### Circuit Court Opinion

***English v. Board of Education of the Town of Boonton***, 2002 WL 1774047 (3rd Cir. 2002)

Although Lincoln Park students constitute 52% of the student population at Boonton High School, Lincoln Park is limited to only one seat on the ten-member Boonton Board of Education under New Jersey's "send-receive" legislation. A resident and taxpayer from Lincoln Park filed suit against Boonton in federal court, claiming that the one-vote law violates his Fourteenth Amendment Equal Protection right to proportional representation. The Third Circuit Court of Appeals ruled that this did not offend the constitutional principle of "one person, one vote." It found that school boards of receiving districts, such as Boonton, not only make decisions affecting their high schools but also make decisions that affect the K-8 schools in their districts. Based on Lincoln Park's limited interests in the affairs of Boonton's board, the court concluded that the law served a legitimate state purpose of providing a sending school with a modest voice in the governance of the receiving district while preserving the receiving district's ability to control its own affairs without interference from a sending district that has no vested interest in the receiving district's long term affairs or K-8 education program.

### Federal District Court Opinions

***Center for Law and Education v. United States Department of Education***, 209 F. Supp. 2d 102 (D.D.C. 2002)

The Center for Law and Education brought an action challenging the U.S. Department of Education's process of negotiated rulemaking for the recently enacted federal statute, No Child Left Behind Act (NCLB). The federal district court for the District of Columbia dismissed the lawsuit. The court concluded that the NCLB had incorporated a provision from the Negotiated Rulemaking Act of 1990 that prohibits judicial review of a federal agency's action regarding the "establishing, assisting, or terminating [of] a negotiated rulemaking committee." The court also found that the suit could not be heard at this time since the Department's actions did not include issuance of final regulations.

### State Lower Court Opinions

***Blaisdell v. Whittier City School District***, 2002 WL 187076 (Cal. App. 2002)

A California appellate court ruled that the Whittier City School District school board's discussions and decisions in secret sessions regarding the selection of a site for a new elementary school violated the state open meetings law. It rejected the school district's argument that it cured or corrected its violation by holding an open board meeting on the subject after the closed session. The court found that the decision had actually been made at the closed meeting, and the second meeting was null and void for purposes of satisfying the state law's open meeting requirement.

***Harrisburg School District v. Zogby***, 789 A.2d 797 (Pa. Commw. 2002)

Pennsylvania enacted the Education Empowerment Act (EEA) requiring mayors in selected municipalities where the school district had a history of low-test scores on state assessment tests to appoint an empowerment team to develop a plan to improve the school district. Harrisburg School District fell within the statutory classification. It brought suit challenging the constitutionality of the EEA under both the federal and state constitutions. A state appellate court ruled that the EEA violated several state and federal constitutional provisions. The court first found that the statute violated the state constitutional provision prohibiting special legislation, the equal protection clauses of both the state and federal constitutions, and the state constitutional provision prohibiting the vesting of powers in a mayor without the approval of the city's voters.

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***Chevron U.S.A. Inc. v. Echazabal***, 122 S. Ct. 2045 (2002)
http://supct.law.cornell.edu/supct/html/00-1406.ZS.html

**Issue:** Whether the Equal Employment Opportunity Commission (EEOC) regulation sanctioning an employer's refusal to employ an individual because the job would endanger the employee's health exceeds the scope of the Americans with Disabilities Act of 1990 (ADA).

**Facts:** Mr. Echazabal worked for an independent contractor at one of Chevron's oil refineries until Chevron refused to allow him to continue working because of his liver condition. Doctors had said that his illness would be aggravated by continued exposure to toxins at the refinery. The contractor subsequently laid him off in response to Chevron's request for reassignment to a job without exposure to toxins. Mr. Echazabal filed suit, alleging that Chevron's actions violated the ADA in refusing to hire him or allow him to continue working at the refinery. Chevron defended its actions, claiming that the EEOC permitted a worker to be refused employment if it would pose a direct threat to the employee's health. The district court granted Chevron summary judgment, but that ruling was later reversed by the Ninth Circuit Court of Appeals, which held that the EEOC regulation was not permissible under the ADA.

**Holding:** The Supreme Court reversed the Ninth Circuit opinion, holding that the EEOC regulation does not exceed the scope of permissible rulemaking under the ADA. The Court held that the ADA discrimination provisions are in place to prevent employers from holding back disabled persons from advancing in the workplace. Among those regulations, is an affirmative defense for actions taken by employers to "protect the health and safety of other individuals in the workplace." The EEOC regulation carries this affirmative defense one step further by allowing employers to screen out potential workers whose disability on the job poses a risk to their own health and safety.

***Edelman v. Lynchburg College*****,** 122 S. Ct. 1145 (2002)
http://supct.law.cornell.edu/supct/html/00-1072.ZS.html

**Issue:** Whether the verification of an Equal Employment Opportunity Commission (EEOC) discrimination complaint must be filed within the same time limitation as the original charge.

**Facts:** The statutory language of Title VII of the Civil Rights Act of 1964 (Title VII) requires that a discrimination charge be filed within a given time period from the date of the alleged discrimination. After being denied academic tenure by Lynchburg College, Edelman faxed a letter to the EEOC, claiming that the college had subjected him to gender-based, national-origin, and religious discrimination. At that time he was advised to file a charge form to verify the complaint within a 300-day time limit. Edelman returned the verification form 313 days after the college denied him tenure. He subsequently sued the college in state court on various state law claims, but later included a Title VII complaint. The college had the case removed to federal court and moved to dismiss, claiming that Edelman's failure to file the verification form within the specified 300 days barred the suit. Edelman responded claiming his initial fax to the EEOC was a timely charge of discrimination and the time of verification could fall outside the 300-day limit. The district court disagreed and dismissed the Title VII claim. The Fourth Circuit affirmed, stating that since a verified charge must be made within a set time-period, both the original accusation and the verification must fall within the established time limit.

**Holding:** The Supreme Court disagreed and reversed the previous courts' decisions. The Court stated that the time limitation is in place to persuade potential parties to file initial claims before they get stale, and the verification process is there to protect employers from having to respond to unjustified claims. Therefore, the time limitation is only applicable to the initial discrimination charge.

***EEOC v. Waffle House***, 122 S. Ct. 754 (2002)
http://supct.law.cornell.edu/supct/html/99-1823.ZS.html

**Issue:** Whether an agreement between an employer and employee to arbitrate employment-related disputes precludes the Equal Employment Opportunity Commission (EEOC) from seeking victim-specific judicial remedies.

**Facts:** An agreement between Waffle House and its employees stipulated that employment disputes would be settled by binding arbitration. After suffering a seizure, a Waffle House employee, Eric Baker, was subsequently fired. In response he filed with the EEOC a discrimination charge alleging his discharge violated Title I of the Americans with Disabilities Act (ADA). The EEOC filed an enforcement suit against Waffle House, alleging that its employment practices violated the ADA and were done intentionally with malice and reckless indifference. The suit requested injunctive relief to eliminate the effects of Waffle House's employment practices and victim-specific relief, including back pay, reinstatement, compensatory damages and punitive damages, for Mr. Baker. Waffle House unsuccessfully petitioned the district court to stay the EEOC suit and compel arbitration under its employment agreement, or in the alternative to dismiss the suit. The Fourth Circuit affirmed, stating that the arbitration agreement did not foreclose action by the EEOC because the agency was not a party to the arbitration agreement. However, the court did hold that the EEOC was limited to injunctive relief and was precluded from seeking victim-specific relief because the Federal Arbitration Act favoring arbitration agreements outweighed the EEOC's right to proceed for private interests.

**Holding:** The Supreme Court reversed the Fourth Circuit, holding that an employer and employee arbitration agreement does not prevent the EEOC from seeking judicial remedies, including victim-specific relief when enforcing the ADA. The Court stated that nothing in the law suggests that the existence of an arbitration agreement between private parties changes the EEOC's function or possible remedies when regulating employment practices. The Court went on to say that the Federal Arbitration Act is in place to ensure enforceability of private agreements to arbitrate, not to place restrictions on the EEOC's right to pursue legal action.

***Ragsdale v. Wolverine World Wide***, 122 S. Ct. 1155 (2002)
http://supct.law.cornell.edu/supct/html/00-6029.ZS.html

**Issue:** Whether a Department of Labor regulation goes beyond the restraints of the Family and Medical Leave Act of 1993 (FMLA) and the authority of the Secretary of Labor.

**Facts:** FMLA requires employers to grant at least 12 weeks of unpaid leave in a 12-month period for certain medical and family needs of employees. While employed by Wolverine World Wide, Inc., Ragsdale was granted 30 weeks of medical leave under the company's leave policy. At the end of the 30 weeks, Wolverine denied Ragsdale's request for additional leave and/or permission to work part-time. It terminated her when she refused to return to work. She sued Wolverine, claiming that a Department of Labor Regulation, 29 C.F.R. Section 825.700(a), required the employer to grant her 12 additional weeks of leave because it had not informed her that her 30-week absence would count toward her FMLA entitlement. Section 825.700(a) requires an employer to give employees written notice that an absence will be considered FMLA leave within a reasonable time period after the employee informs the employer of his intention to take leave. Under the regulation, if the employer fails to notify or designate the leave as FMLA leave, any medical leave taken by the employee does not count as FMLA leave, thus entitling the employee to take an additional 12 weeks of FMLA leave. The district court granted and the Eighth Circuit affirmed Wolverine's motion for summary judgment, holding that the regulation conflicted with the FMLA statute by requiring Wolverine to grant more than the 12 weeks of FMLA required leave in one calendar year.

**Holding:** The Supreme Court affirmed the lower courts' decisions, stating that Section 825.700(a) was contrary to the Family and Medical Leave Act and exceeded the scope of the agency's authority. The Court invalidated the regulation because it was contrary to the FMLA's requirement for employers to grant a "total" of 12 weeks of leave in a 12-month period and thus gave employees more leave then they were guaranteed under the statutory mandate.

***Toyota Motor Manuf. v. Williams***, 122 S. Ct. 681 (2002)
http://supct.law.cornell.edu/supct/html/00-1089.ZS.html

**Issue:** What are the proper standards for establishing whether a person is disabled under the Americans with Disabilities Act of 1990 (ADA)?

**Facts:** An employee of Toyota Motor Manufacturing claimed to be impaired in performing certain tasks on her automobile assembly-line job. She had carpal tunnel syndrome and related impairments. She sued her employer for failing to provide her with a reasonable accommodation as required by the ADA. The district court granted Toyota summary judgment, holding that the employee's impairments did not qualify as a disability under the ADA. The court held that because her ailments did not "substantially limit" any "major life activity," she would not qualify as disabled under the ADA. The Sixth Circuit Court of Appeals reversed the decision, granting the employee partial summary judgment on the issue of being disabled under the ADA. The court held that her impairments substantially limited the employee in the major life activity of performing manual tasks and that the employee's manual disability involved a "class" of activities affecting her ability to perform work. The court also held that evidence showing the employee could tend to personal hygiene and carry out household chores did not affect the determination that her impairments qualified as a disability under the ADA.

**Holding:** The Supreme Court reversed the Sixth Circuit, holding that to gain protection under the ADA, an individual must show that the impairment prevents or severely restricts the person from performing tasks that are of "central importance" to most people's daily lives. The evidence must extend beyond the individual's restrictions in performing the manual tasks associated with a specific job or class of activities. The Court reasoned that the ADA definitions are intended to cover individuals with impairments regardless of whether they have any connection to a workplace whatsoever. Furthermore, the Sixth Circuit erred in excluding evidence of household chores such as bathing and brushing one's teeth because these are the manual tasks of central importance to people's daily lives and should be considered when determining a disability under the ADA.

***U.S. Airways v. Barnett***, 122 S. Ct. 1516 (2002)
http://supct.law.cornell.edu/supct/html/00-1250.ZS.html

**Issue:** Whether accommodating an employee's disability in the face of an employer's established seniority system creates "undue hardship" on the operation of its business.

**Facts:** While employed as a cargo handler for U.S. Airways, Mr. Barnett injured his back and was transferred to a less physically demanding position in the mailroom. Under the airline's seniority system, the position became subject to bidding by other employees with more seniority than Barnett. He requested that he be allowed to remain in the mailroom as an accommodation of his disability, but the airline refused. Barnett subsequently lost his job. He then filed suit under the Americans with Disabilities Act (ADA). The ADA prevents employers from discriminating against employees with disabilities who with "reasonable accommodation" can perform the job's necessary functions, unless the employer can demonstrate that the accommodation would create "undue hardship" on the operation of its business. U.S. Airways filed a motion for summary judgment, arguing that altering the seniority system would result in "undue hardship" to both the airline's business practices and its nondisabled employees. The Ninth Circuit Court of Appeals reversed the district court's grant of summary judgment, stating that the seniority system was merely one piece in the analysis and that a case-by-case investigation was required when determining whether a particular accommodation would create "undue hardship."

**Holding:** The Supreme Court disagreed and vacated the Ninth Circuit decision. The Court held that under the ADA where an accommodation requested by an employee conflicts with an employer's established seniority rules, the accommodation is unreasonable as a matter of law. The Court went on to say that the analysis does not require a case-by-case analysis because the typical seniority system provides employees with job security and an expectation that advancement will be in a fair and uniform manner. However, the Court did state that an employee remains free to present evidence of special circumstances that warrant making an exception. These exceptions could include evidence that an employer frequently changed the seniority system or that the system already contained certain exceptions.

*Ashcroft v. ACLU*, 122 S. Ct. 1700 (2002)
http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol =000&invol=00-1293

**Issue:** Whether the provisions of the Child Online Protection Act (COPA) are substantially overbroad with respect to its "contemporary community standards" obscenity test.

**Facts:** After the Supreme Court struck down the Communications Decency Act (CDA) on constitutional grounds, Congress enacted new legislation, COPA, regulating material displayed on the World Wide Web. COPA applies to communications made for commercial purposes and regulates material that could be harmful to minors. The law contains a three-part obscenity test that requires jurors to apply "contemporary community standards" in assessing Internet material. The ACLU, representing plaintiffs who post sexually oriented material on the Web, challenged COPA on the ground that it is overbroad, thus violating the First Amendment. A federal district court issued a preliminary injunction barring enforcement of COPA. The Third Circuit affirmed, finding that the use of the "contemporary community standards" to identify harmful material rendered COPA overbroad.

**Holding:** The Supreme Court disagreed and vacated the decision of the Third Circuit, holding that the "community standards" test does not by itself render the statute substantially overbroad for First Amendment purposes. The Court held that its prior community standards jurisprudence has no applicability to the Internet because Web publishers cannot control the geographic scope of their communications. The Court pointed out that if a publisher chooses to send its material into a particular community, then it is the responsibility of the publisher to abide by that community's standards. The Court also stated that the publishers could avoid running afoul of particular community standards by using a medium that enables them to focus on specific communities where they are welcome.

***Ashcroft v. Free Speech Coalition***, 122 S. Ct. 1389 (2002)
http://supct.law.cornell.edu/supct/html/00-795.ZS.html

**Issue:** Whether the Child Pornography Prevention Act of 1996 (CPPA) is unconstitutional as substantially overbroad.

**Facts:** The CPPA expanded the federal prohibition on child pornography to include not only pornographic images made using actual children, but also "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct." The CPPA also banned any sexually explicit image that is advertised, promoted, presented, described, or distributed in such a manner that "conveys the impression" that it is depicting "a minor engaging in sexually explicit conduct." The Free Speech Coalition, an adult-entertainment trade association, filed suit against the federal government, claiming that the CPPA's ban on "virtual child pornography" is an unconstitutional limitation of their First Amendment rights because the terms "appears to be" and "conveys the impression" are substantially overbroad and vague. The district court did not agree however, and granted the government's motion for summary judgment. The Ninth Circuit Court of Appeals reversed the summary judgment, and held that the CPPA was unconstitutional because it bans materials that are neither obscene under the definition in *Miller v. California*, 413 U.S. 15 (1973), nor produced by the exploitation of real children as in *New York v. Ferber*, 458 U.S. 747 (1982).

**Holding:** The Supreme Court agreed with the Ninth Circuit holding that the CPPA was unconstitutional. The Court found the statute unconstitutionally overbroad as it prohibits speech that is neither obscene under *Miller* nor child pornography under *Ferber*. The majority rejected the government's reliance on *Ferber* based on its interest in preventing child pornography from being used as an aid in the solicitation of minors. On this issue, the majority concluded that unlike flesh and blood participants that the Court referred to in *Ferber* as "victims of child pornography," the CPPA prohibits speech that neither records crime nor creates victims by its production. The majority expressed sympathy for the government's desire to protect children from pedophiles, but it pointed out "the government may not suppress lawful speech as the means to suppress unlawful speech."

***Board of Education of Independent School District No. 92 of Pottawatomie County, Oklahoma v. Earls***, 122 S. Ct. 2559 (2002)
http://a257.g.akamaitech.net/7/257/2422/27jun20021045/www.supremecourtus.gov/opinions/01pdf/01-332.pdf

**Issue:** Whether a school district policy of drug testing students involved in extracurricular activities is unconstitutional.

**Facts:** Tecumseh School District in Pottawatomie County, Oklahoma implemented a mandatory drug testing policy for all public high school students participating in extracurricular activities. The policy required those students to consent to random, suspicionless drug testing via urinalysis. Two students, Lindsay Earls and Daniel James, challenged the policy on the ground that it violated their Fourth Amendment right to be free from unreasonable searches. The Tenth Circuit ruled that the school district's drug testing policy was unconstitutional. The court found that drug use by students involved in extracurricular activities other than athletics, such as band or choir, did not expose them to any greater safety risk than non-participants who use drugs. It also concluded that the school district's contention that it had an identifiable drug abuse problem among students involved in extracurricular activities was not supported by the record.

**Holding:** In a 5 to 4 decision written by Justice Thomas, the court concluded that the drug testing policy was constitutional. Although students participating in non-athletic extracurricular activities are not subject to the same level of physical intimacy and communal undress as student-athletes they do "voluntarily subject themselves to many of the same intrusions of their privacy as do athletes." The Court also found that testing students participating in extracurricular activities is a reasonably effective means of addressing the school district's legitimate interests in detecting, deterring, and preventing student drug use.

***Gonzaga University v. Doe***, 122 S. Ct. 2268 (2002)
http://supct.law.cornell.edu/supct/html/01-679.ZS.html

**Issue:** Whether an individual has the right to sue an educational institution for an alleged FERPA violation.

**Facts:** A Gonzaga School of Education student was suspected of committing a date rape. The results of the date rape investigation were turned over to the Gonzaga Dean of Education who established that there was adequate evidence supporting a serious behavioral problem by the student. She believed the problem prohibited her from signing the moral character affidavit supporting the student's application for teacher certification in the State of Washington. The student was not informed of the investigation until the dean notified him that she would not sign the moral character affidavit in light of the rape allegations. Additionally, the school informed the Washington State Office of the Superintendent of Public Instruction (OSPI) about the rape allegations. The student sued the university, alleging that the university violated his FERPA rights when it released the rape information to the OSPI. A state court jury trial returned a verdict for the student, which was reversed by the Washington State Court of Appeals. The Washington Supreme Court affirmed, conceding that FERPA itself does not give rise to a private cause of action but that it does give rise to a federal right enforceable under 42 U.S.C. Section 1983.

**Holding:** The Supreme Court reversed the decision of the Washington Supreme Court and held that a student may not sue a university for damages under §1983 to enforce provisions of FERPA. The majority stated that based on the statutory language of FERPA and its legislative history, there exists no individual right to sue. The focus of FERPA is on the aggregate, not the individual, and its provisions "serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions."

***Owasso Indep. Sch. Dist. v. Falvo***, 122 S. Ct. 934 (2002)
http://supct.law.cornell.edu/supct/html/00-1073.ZS.html

**Issue:** Does peer grading violate the provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA)?

**Facts:** Several Owasso School District teachers had students grade each other's assignments and tests (peer grading), and then call out the grades to the teacher in class. A parent with three children attending school within the district objected to the peer grading because it embarrassed her children. The superintendent refused to end the practice. The parent subsequently filed suit alleging the grading practice violated her children's right to privacy under the Fourteenth Amendment and FERPA. The district court granted the school district's motion for summary judgment, holding that peer grading did not implicate the student's right to privacy, and the grades were not "educational records" under FERPA. The Tenth Circuit reversed, holding that FERPA provided the parent with a cause of action because the grades marked by students on each other's assignments are "education records," and therefore, the very act of grading is an impermissible release of information to the student grader.

**Holding:** The Supreme Court vacated the Tenth Circuit decision, holding that peer grading does not violate the provisions of FERPA. The Court held that under FERPA, the grades must be "maintained … by a person acting for [an educational] agency or institution." It said the definition would suggest that grades kept in a record room file or secure database would be covered. In this case, the Court said the student grades were not "maintained" but only handled for a few moments before being recorded by the teacher. Secondly, the Court took exception to the notion that the student graders were "acting for" the educational institution. The Court stated that the students were merely assisting the teacher when they graded assignments, not acting on behalf of the school as an institution.

***Simmons-Harris v. Zelman***, 122 S. Ct. 2460 (2002)
http://a257.g.akamaitech.net/7/257/2422/27jun20021045/www.supremecourtus.gov/opinions/01pdf/00-1751.pdf

**Issue:** Whether the Cleveland voucher program violates the First Amendment's Establishment Clause.

**Facts:** The Cleveland voucher program gives tuition money to families with children in kindergarten through the eighth grade, with preference given to students from families with income that is less than 200 percent of the poverty level. Scholarship checks, although made payable to the parent, are mailed directly to the child's school. The parent is then required to endorse the check over to the private or public school in which the child is enrolled. In the 1999-2000 school year, 3,761 students enrolled in the program, and 60 percent of the enrollees were from families at or below the poverty level. Of these students, 3,632 (96 percent) were enrolled in sectarian schools. The U.S. District Court for the Northern District of Ohio found the Cleveland pilot voucher program unconstitutional. The state appealed to the Sixth Circuit. The state argued that the voucher program does not violate the Establishment Clause because the vouchers are available to low-income parents to use for either public or private schools participating in the program. The Sixth Circuit found *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), controlling on the issue of whether the voucher program that provides public funds to pay for private school tuition for low-income students violates the Establishment Clause. It found that the Cleveland voucher program could not be factually distinguished from *Nyquist* in a way that would free the program "from the reach of the [Establishment] Clause's constitutional prohibition."

**Holding:** In a 5 to 4 split, the Supreme Court ruled that Cleveland's school voucher program does not violate the First Amendment's Establishment Clause. Chief Justice Rehnquist, writing for the Court, found that the program was enacted for the valid secular purpose of providing Cleveland's poorest children with educational alternatives to the city's admittedly failing public school system. He concluded that the program was consistent with previous cases because the Cleveland program is neutral in all respects toward religion and is merely one of several educational opportunities that the State of Ohio provides its school children. The majority rejected the Sixth Circuit's reasoning that the prevalence of Catholic schools in the program created a perception of government endorsement of religion. Instead, the Court concluded that a reasonable observer would infer that the predominance of Catholic schools was a product of demographics rather than design by the state to advance religion. The majority asserted "that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of numerous independent decisions of private individuals, carries the imprimatur of government endorsement."

***Lapides v. Board of Regents of the Univ. Sys. of Georgia***, 122 S. Ct. 1640 (2002)
http://supct.law.cornell.edu/supct/html/01-298.ZS.html

**Issue:** Whether a state waives its Eleventh Amendment immunity when it removes a case from state court to federal court.

**Facts:** A professor in the Georgia State University system filed a suit in court against the Board of Regents and university officials, alleging that they had violated state tort law and his federal privacy rights by placing sexual harassment allegations in his personnel file. The university removed the case to federal district court and sought dismissal. The university claimed that although state law waived Georgia's sovereign immunity from state lawsuits in state court, it was entitled to Eleventh Amendment immunity in federal court. The district court held that Georgia had waived its immunity by moving the case to federal court. The Eleventh Circuit Court of Appeals reversed, finding that because state law was unclear as to whether the state attorney general had the legal authority to waive Georgia's immunity, the State retained the legal right to assert immunity, even after removal.

**Holding:** The Supreme Court reversed the Eleventh Circuit decision, holding that a state waives its Eleventh Amendment immunity when it removes a case from state court to federal court. The Court held that as an established principle, a state's voluntary appearance in federal court amounts to a waiver of its Eleventh Amendment immunity. Here, Georgia although brought involuntarily into the suit, did voluntarily remove the case to federal court, thus invoking that court's jurisdiction.

***Barnes v. Gorman*, 122 S. Ct. 2097 (2002)**
http://supct.law.cornell.edu/supct/html/01-682.ZS.html

**Issue:** Whether punitive damages may be awarded in private suits brought under the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973.

**Facts:** Mr. Gorman, a paraplegic, was arrested for trespass in Kansas City. Over his objections, he was moved from his wheelchair and strapped into a police van. During the ride to the police station, Mr. Gorman fell to the floor, rupturing his urine bag and injuring his shoulder and back. The police officer fastened him to the floor of the van for the remainder of the trip. Due to these events, Mr. Gorman suffered serious medical problems including a bladder infection, serious lower back pain and uncontrollable spasms in his paralyzed areas, leaving him unable to work full time. He sued the police officials and officers for discriminating against him on the basis of his disability in violation of the ADA and Rehabilitation Act. A jury awarded Mr. Gorman over two million dollars in both compensatory and punitive damages for the police department's failure to maintain appropriate policies for the arrest and transportation of persons with disabilities. The district court vacated the decision as to the punitive damages, holding that punitive damages are unavailable in private suits brought under Title II of the ADA and Rehabilitation Act. The Eighth Circuit Court of Appeals reversed the district court, finding that punitive damages are available under the "general rule" of *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). The court ruled, that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief" for violation of a federal right.

**Holding:** The Supreme Court disagreed and reversed the decision of the Eighth Circuit, holding that punitive damages may not be awarded in private suits brought under Title II of the ADA and the Rehabilitation Act. The Court pointed out that both statutes have incorporated the rights, remedies and procedures available under Title VI of the 1964 Civil Rights Act. Under Title VI and other federal funding statutes, a funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation but also to those traditionally available in breach of contract suits. Title VI mentions no remedies, and punitive damages are generally not available for breach of contract. Nor could it be said that Title VI funding recipients have, merely by accepting funds, implicitly consented to a remedy that is not normally available for contract actions. Therefore, because punitive damages may not be awarded in private suits under Title VI, it follows that they may not be awarded in suits under the ADA or Rehabilitation Act.

***Watchtower Bible & Tract Society of New York v. Village of Stratton***, 122 S. Ct. 2080 (2002)
http://supct.law.cornell.edu/supct/html/00-1737.ZS.html

**Issue:** Whether the Village of Stratton's ordinance prohibiting door-to-door advocacy violates the First Amendment.

**Facts:** The Village of Stratton enacted an ordinance that prohibited "canvassers" from "going in and upon" private property to promote any "cause" without obtaining a permit from the mayor's office. The Watchtower Bible & Tract Society of New York, a congregation of Jehovah's Witnesses, filed suit against the Village, alleging that the ordinance violated their First Amendment rights to the free exercise of religion, free speech, and freedom of the press. The district court upheld most of the ordinance as valid, "content-neutral regulations" but did require the Village to narrow some of the provisions. The Sixth Circuit Court of Appeals affirmed, again holding that the ordinance was "content neutral and of general applicability and therefore subject to intermediate scrutiny." The Sixth Circuit also concluded that the Village's interests in protecting its residents from fraud and undue annoyance were sufficient to justify the ordinance.

**Holding:** The Supreme Court reversed the decision, holding that the Village's ordinance violates the First Amendment as it applies to religious proselytizing, anonymous political speech, and the distribution of handbills. The Court held that there was a serious concern over the amount of speech covered by the regulation. The ordinance does not pass First Amendment scrutiny because it is overbroad and not individually tailored to the Village's stated interests. Even if the interest in preventing fraud could satisfactorily support the regulation as it applies to commercial solicitations, that interest provides no support for its application to religious organizations or individuals involved in political campaigns.

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**Legal Issues & Education Technology: A School Leader's Guide** (September 2001). This publication focuses on preventive strategies school leaders need to avoid costly and disruptive litigation that may result from incautious implementation or administration of technology in schools. The contents reflect recent legislation and court decisions and are presented in an easy to read format. Topics include Internet filters, legal requirements for accessible Web design and ergonomically sound facilities, student and staff privacy rights,COPPA, CIPA, FERPA, and ADA compliance issues and updates, copyright, acceptable use policies, off-site data storage policies, commercial agreements with e-businesses, open-meeting "sunshine" laws, and more. 154 pages. ISBN 0-88364-247-6 (List $35, Council, Technology Leadership Network members and National Affiliate members $28).

**No Child Left Behind Briefing Book**(October 2002). This publication includes materials presented at the Council's briefing on the No Child Left Behind Act in October, 2002. Resource documents cover timelines, notice requirements, policy development, frequently asked questions, testing and accountability mandates, school choice, personnel issues and miscellaneous requirements imposed under this massive federal education statute. ISBN 0-88364-263-8. (List $30, National Affiliate and Council members, $25) Order No. 06-190-1.

**Reasonable Accommodation of Disabled Employees: A Comprehensive Case Law Reference** (February 1996) by Brian Shaw. This reference book provides brief summaries of over 200 cases deciding reasonable accommodation issues under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. The summaries are arranged topically addressing: 1) general issues such as standards, knowledge of disability, suggesting an accommodation, burden of proof, and good faith defense; 2) over 20 different types of accommodations; and 3) undue hardship issues. A detailed table of contents and table of cases provide easy access to school attorneys looking for case law to help answer their clients' accommodation questions. 95 pages. ISBN 0-88364-200-X (List $15, National Affiliates/ Council of School Attorneys price $12).

**Religion & Public Schools: Striking A Constitutional Balance** (Revised edition, August 2001). This edition discusses the latest developments in the law, including the Supreme Court's decisions in *Milford, Mitchell, Santa Fe* and *Agostini*. This monograph is a compilation of articles written by Council members and focuses on the effect of the establishment and free exercise clauses of the first amendment and the constitutional issues surrounding accommodating employee religious beliefs, wearing of religious garb, curriculum content, school prayer/moment of silence, holiday observances, equal access, home schools and much more. 246 pages. ISBN 0-88364-244-1 (List $35, National Affiliates and Council members $28).

**Safe Schools, Safe Communities** (September 2000). Emphasizing the need for cooperation to prevent and respond to violence at school, this book examines how schools and communities can work together to make our schools safe. Among the topics discussed are the need to balance school safety needs and the rights of individual students, how to deal with threats of violence, the role of the school attorney in response to violence, and how to work with the media in times of crisis. Also included are other helpful materials such as sample interagency agreements, a list of other resources on school safety, warning signs that should trigger school response and sample policies. 98 Pages. ISBN 0-88364-238-7 (List $25, National Affiliates and Council Members $20).

**A School Law Primer: Part I** (Revised edition, January 2001). Created to meet the needs of the attorneys who serve public school districts and those of the school community at large, *A School Law Primer: Part I* is intended as a training manual to help you keep your clients out of court. Specifically, the *Primer* was designed to save hundreds of hours in research time, help when you have been called upon to do a presentation, and be a valuable resource for training new associates and clients. Each chapter consists of three main components - a presentation outline and case summaries, participant "notes pages," and a diskette containing Microsoft PowerPoint® slides that correspond to the outline. This revised edition features these subjects: Student Discipline, Students' Rights, Special Education, and Teacher Discipline. ISBN 0-88364-224-7 (List $400.00, National Affiliates and Council Members $320.00. Purchase two editions of the Primer for $512, non member price $640, or all three editions for $768. Non member price $960).

**A School Law Primer: Part II** (March 2000). Update your law library with the second part of this training tool. This school law training manual covers Employee Rights, Negligence, School Safety and Sexual Harassment. Each chapter consists of three main components — a presentation outline and case summaries; participant "notes pages;" and a diskette containing Microsoft Powerpoint® slides that correspond to the outline. ISBN 0-88364-234-4 (List $400, NSBA Council of School Attorneys' members and NSBA National Affiliate School Districts $320. Purchase two editions of the Primer for $512, non member price $640, or all three editions for $768. Non member price $960).

**A School Law Primer: Part III** (April 2002). This edition of the School Law Primer series features the following subjects: Religion, Discrimination, Board Authority and Curriculum Issues. Each chapter contains presentation outlines and case summaries, participant "notes pages" and ready made Power Point® slides available on a diskette or via the Internet. This approach was selected to help new school attorneys learn quickly the fundamental principles that will form their stock in trade as well as to save time for attorneys called upon to prepare and present school law training for school board members, administrators, staff or other school attorneys. ISBN 0-88364-255-7 (List $400, NSBA Council of School Attorneys' members and NSBA National Affiliate School Districts $320. Purchase two editions of the Primer for $512, non member price $640, or all three editions for $768. Non member price $960).

**School Law in Review 2002** (April 2002). This digest of papers presented at the 2002 Annual School Law Seminar includes the following topics: students' rights, religion, environmental hazards for urban schools, high stakes testing, free speech, school employee misconduct and misuse of technology, diversity in higher education, student drug testing, FERPA and student record keeping, investment contracts, FLSA record keeping practice tips, ethics, Supreme Court and legislative updates, IEP development process, and school construction issues. ISBN 0-88364-254-9 (List $40, Council members - first copy free. National Affiliates and additional Council copies $32).

**School Reform: The Legal Challenges of Change** (April 1996). This monograph is intended to assist school attorneys in their efforts to advise school boards on the legal issues that accompany various reform measures. Covering such topics as school finance, choice, site-based management, privatization, alternative schools, charter schools and tenure reform, the discussion ranges from constitutional dilemmas to statutory issues to labor relations implications. Review of the law is supplemented with practical advice. 150 pages. ISBN 0-88364-202-6 (List $30, National Affiliates and Council members $25).

**Selecting and Working with a School Attorney: A Guide for School Boards** (April 1997). In today's world, getting good legal advice when problems arise and how to avoid problems in the first place is a must for school boards. This book shows school board members how to select and to work effectively with a school attorney. Topics include: historical development of the role of the school attorney, hiring in-house counsel v. an outside attorney, selection, recruitment and retention of legal counsel, ethical issues in school board representation, evaluation and termination of school district counsel, the school attorney as a preventive law practitioner, and how to work effectively with the school attorney. Also included in the appendices are sample policies, forms, agreements and checklists. 142 pages. ISBN 0-88364-209-3 (List $35, National Affiliates and Council members $28).

**Sexual Harassment by School Employees** (March 2001). School leaders and school lawyers faced with the task of preventing and responding to allegations of sexual harassment by employees will find the information they need in this monograph. Covering harassment that occurs between employees and employee harassment of students, it discusses current federal case law, effective policy development, how to conduct internal investigations, training advice and resources and agency (OCR and EEOC) investigations. The appendices contain many useful documents including regulations, agency guidance, sample policies and checklists. 228 pages. ISBN 0-88364-237-9 (List $35, National Affiliates and Council members $28).

**Student-to-Student Sexual Harassment: A Legal Guide for Schools** (Revised edition, March 2000). Addressing a complex legal and social issue, this monograph provides the school law practitioner and school leader with information on how to prevent, respond to, analyze and defend student to student harassment claims. In addition to discussing federal case law, it includes a section on policy development, advice on conducting investigation, tips for training, and analysis of the Office for Civil Rights guidelines and appendices containing OCR documents, sample policies and forms and helpful check lists. 192 pages. ISBN 0-88364-235-2 (List $35, National Affiliates and Council members $28).

**Student Testing and Assessment: Answering the Legal Questions** (September 2000). Addressing one of the most controversial developments in education reform today, this publication takes a look at the legal issues with which education leaders and decision makers are faced in setting policy on and implementing high-stakes testing programs. Among the materials included are an overview of state testing laws and federal activity, a framework for making policy decisions about test use, discrimination and due process issues that may arise, considerations for testing special student groups, such as children with disabilities and limited English proficiency, and accountability of educators, schools and districts based on student test scores. 86 Pages. ISBN 0-88364-239-5 (List $25, National Affiliates and Council members $20).

**Termination of School Employees: Legal Issues and Techniques** (April 1997). Disputes over employee termination are the most common legal problem faced by schools. In order to assist school attorneys and officials in handling these disputes, this monograph addresses the legal issues and suggests effective techniques associated with proper termination of school employees. Topics include: employee performance documentation, evaluation, remediation, settlement agreements, public employee speech and off duty conduct, termination of drug/alcohol abusers, legal issues in trying a misconduct case, due process, and employment at will. 316 pages. ISBN 0-88364-210-7 (List $35, National Affiliates and Council **members $28).**

**Understanding and Limiting School Board Member Liability** (October 2002). This book, now in its fourth edition, serves as primer for both school board members and school attorneys on board member liability issues. Using layman's terms, this version expands beyond the focus of former editions on Section 1983 liability to include explanations of how our legal system works, board member liability under state tort law, legal defenses and immunities against liability and a special section on how to avoid and minimize board member liability. Each chapter is followed by checklists to help readers review and remember key points. 90 pages. ISBN 0-88364-261-1. (List $15, National Affiliate and Council members, $12) Order No. 06-187-1.

**The 1999 IDEA Regulations: A Practical Analysis** (July 1999). It is imperative that schools understand the special rules and requirements that they must follow in addressing the needs of students served under the Individuals with Disabilities Education Act (IDEA). This publication is a guide for all school professionals involved in special education to grasp the basic requirements and implications of the regulations issued by the U.S. Department of Education. Using an easy to follow format that tracks the regulations rule-by-rule, special education experts explain what you need to know and what you must do to comply with the provisions on a broad range of issues including public charter schools, graduation of special needs students, assessments, use of Medicaid and insurance, IEP requirements, services to children in private schools, procedural safeguards, and discipline of children with disabilities. 96 pages. ISBN 0-88364-225-5 (List $25, National Affiliates and Council members $20).

**2001 Advocacy Seminar Notebook** (October 2001, Alexandria, Virginia). This loose-leaf notebook is a compilation of the presentations given at the Council's October 2001 advocacy seminar. Topics include drawing the line separating church and state, constitutional rights of secondary school students, current issues in special education, current issues in employment discrimination, vouchers and school choice, Title I of the Elementary and Secondary Education Act of 1965, high-stakes testing; Americans with Disabilities Act, ethics and the school attorney, Children's Internet Protection Act, student discipline, federal issues and national trends, and inside the Supreme Court. 606 pages. ISBN 0-88364-250-6 (List $200, National Affiliates and Council members $160).

**2000 Advocacy Seminar Notebook** (October 2000, Phoenix, Arizona). This loose-leaf trial notebook is a compilation of the presentations given at the Council's October 2000 advocacy seminar. Topics include responding to student threats, current issues of students with disabilities, FERPA, E-mail and access to public meetings and records, the latest on prayer in schools, Equal Access Act, legal considerations in measures to promote school safety, recent developments in hiring and retaining superintendents, responding to temporary restraining orders, high stakes testing, disciplining employees for off-campus conduct, private businesses and schools, race as a factor in student assignment, Cincinnati's alternative dispute resolution process, do not resuscitate orders and other issues related to medically fragile students, and the attorney-client privilege. 628 pages. ISBN 0-88364-241-7 (List $200, National Affiliates and Council members $160).

**A School Law Retreat 1999** (October 1999, Charleston, South Carolina). This loose-leaf trial notebook is a compilation of the presentations given at the Council's October 1999 advocacy seminar. Topics include tuition vouchers, student drug testing, employee benefits, superintendent contracts and settlement agreements, peer sexual harassment, the Internet and use of e-mail, board member issues, linking teacher evaluation to student achievement, sexual orientation, student and employee issues, religion and the schools, voluntary desegregation, student-to-student sexual harassment claims under Title IX, student control and discipline, responding to threats of violence, the ethical use of technology in the practice of school law, and the Individuals with Disabilities Education Act (IDEA). 440 pages. ISBN 0-88364-288-X (List $200, National Affiliates and Council members $160).

# about NSBA...

The National School Boards Association is the nationwide organization representing public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education through school board leadership. NSBA achieves its mission by representing the school board perspective before federal government agencies and with national organizations that affect education, and by providing vital information and services to state associations of school boards and local school boards throughout the nation.

NSBA advocates local school boards as the ultimate expression of grassroots democracy. NSBA supports the capacity of each school board—acting on behalf of and in close concert with the people of its community—to envision the future of education in its community, to establish a structure and environment that allow all students to reach their maximum potential, to provide accountability for the people of its community on performance in the schools, and to serve as the key community advocate for children and youth and their public schools.

Founded in 1940, NSBA is a not-for-profit federation of associations of school boards across the United States and its territories. NSBA represents the nation's 95,000 school board members that govern 14,890 local school districts serving the nation's more than 47 million public school students. Virtually all school board members are elected; the rest are appointed by elected officials.

NSBA policy is determined by a 150-member Delegate Assembly of local school board members. The 25-member Board of Directors translates this policy into action. Programs and services are administered by the NSBA executive director and a 150-person staff. NSBA is located in metropolitan Washington, D.C.

**NSBA's Programs and Services**

- **National Affiliate Program** — enables school boards to work with their state association and NSBA to identify and influence federal and national trends and issues affecting public school governance.
- **Council of Urban Boards of Education** — serves the governance needs of urban school boards.
- **Large District Forum** — serves the governance needs of large but non-urban boards.
- **Rural and Small District Forum** — serves the governance needs of rural and small enrollment districts.
- **Federal Relations Network** — school board members from each congressional district actively participate in NSBA's federal and national advocacy efforts.
- **Federal Policy Coordinators Network** — focuses on the administration of federally funded programs.
- **Award Winning Publications** — **American School Board Journal, School Board News,** and special substantive reports on public school governance throughout the year.
- **ITTE: Education Technology Programs and Technology Leadership Network** — advance public education through best uses of technology in the classroom and school district operations.
- **Council of School Attorneys** — focuses on school law issues and services to school board attorneys.
- **Annual Conference and Exposition** — the nation's largest policy and training conference for local education officials on national and federal issues affecting the public schools in the United States.
- **National Education Policy Network** — provides the latest policy information nationwide and a framework for public governance through written policies.
- **Training/Development and Resource Exchange** — meetings, online clearinghouse and consulting services to develop leadership of state school boards associations and local school boards.

·NSBA·

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*Excellence and Equity in Public Education through School Board Leadership*

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